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91-1176

No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE HONORABLE H. WILLIAM CONSTANGY,
Petitioner,
v.

NORTH CAROLINA CIVIL LIBERTIES UNION
LEGAL FOUNDATION, *et al.*,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an "offended observer" of an alleged violation of the Establishment Clause of the First Amendment have standing under Article III to challenge that alleged violation?

2. Does the custom of a state district judge to open each daily courtroom session with a nonsectarian invocation violate the Establishment Clause of the First Amendment?

PARTIES

The petitioner in this case is the Honorable H. William Constangy. Judge Constangy was the defendant-appellant below.

The respondents in thise case are Ronald Everhart, Kathleen M. Arundell, James Gronquist, Philip F. Howerton, Jr., Sharon Samek, and the North Carolina Civil Liberties Union Legal Foundation. Each of the respondents was a plaintiff-appellee below.

There were no other parties to this proceeding in the court of appeals.

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DECISIONS BELOW

The decision of the district court is reported as *North Carolina Civil Liberties Union v. Constangy,* 751 F. Supp. 552 (W.D.N.C. 1990). The decision of the court of appeals is reported as *North Carolina Civil Liberties Union Legal Foundation v. Constangy,* 947 F.2d 1145 (4th Cir. 1991).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment in this case on October 23, 1991. This Court has jurisdiction, under 28 U.S.C. § 1254 (1), to review the judgment of the court of appeals.

CONSTITUTIONAL PROVISIONS

The second section of Article III of the United States Constitution provides in pertinent part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

> out due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The respondents in this case brought suit in federal district court under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the practice of petitioner, a state trial judge, of opening each daily court session with an invocation. Respondents asserted federal jurisdiction under 28 U.S.C. § 1343.[1]

A. Statement of Facts[2]

Petitioner, the Honorable H. William Constangy, has been a duly appointed Judge of the District Court of the Twenty-Sixth Judicial District of North Carolina since March 3, 1989.

Judge Constangy holds court regularly during approximately 45 weeks each year. Since May of 1989, the bailiff opens Judge Constangy's court in the morning with the cry, "Everyone rise; this Court is now in session, Honorable William Constangy, Judge, presiding. Please be seated."

During and after the bailiff's cry, people in the courtroom come and go, walk around, talk, and engage in courtroom business. Plaintiffs' Ex. 13 (Deposition of Judge William Constangy) at 7; Defts. Ex. 16 (Depo. of Sharon Samek) at 15-16.

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[1] Respondents also alleged a parallel claim, based upon pendent jurisdiction, under the state constitution of North Carolina. However, both the district court and the court of appeals based their decision exclusively upon the federal Establishment Clause, without addressing the state constitutional claim.

[2] Where no citation is given, the facts stated were either stipulated, *see* Defts. Ex. 22 (Stipulations) (App. 31a), or were otherwise uncontested.

After the bailiff's opening cry, Judge Constangy regularly seats himself behind the bench, turns on the light at the bench, and says, "Let us pause for a moment of prayer." He then recites the following invocation aloud:

> O Lord, our God, our Father in Heaven, we pray this morning that you will place your divine guiding hand on this courtroom and that with your mighty outstretched arm you will protect the innocent, give justice to those who have been harmed and mercy to us all. Let truth be heard and wisdom be reflected in the light of your presence here with us today. Amen.

This invocation is a part of the opening of court. Judge Constangy always says the same invocation, with the same introduction, each morning at the opening of court, whether civil or criminal, except when presiding over civil commitment hearings, which are conducted in the mental health clinic.

People are free to come and go—and talk—at any time before or during the invocation (and after, as well, unless their case is before the court). Plaintiffs' Ex. 13 (Depo. of Judge Constangy) at 9; Defts. Ex. 16 (Samek Depo.) at 19 (continued conversing with prosecutor during invocation); Defts. Ex. 18 (Everhart Depo.) at 6 (walked out during invocation). During the invocation, Judge Constangy bows his head and closes his eyes. Tr.[3] 64-66. Judge Constangy does not observe whether any particular people are present—or how they behave—during the invocation. Plaintiffs' Ex. 13 (Depo. of Judge Constangy) at 10; Defts. Ex. 21 (same) at 69. Judge Constangy has never noticed or even mentioned, much less criticized, the presence, absence, or behavior of any individual during the invocation. Defts. Ex. 21 (Depo. of Judge Constangy) at 70; Defts. Ex. 16 (Samek Depo.) at 11-12, 19; Defts. Ex. 17 (Arundell Depo.) at 6-7; Defts.

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[3] The abbreviation "Tr." refers to the transcript of the trial of May 16, 1990.

Ex. 18 (Everhart Depo.) at 6-8; Defts. Ex. 19 (Gronquist Depo.) at 7-8.

The bailiff reopens court in the afternoon with his customary cry. Judge Constangy does not repeat his invocation when court is reopened in the afternoon.

Since becoming a judge, Judge Constangy has presided most frequently over misdemeanor criminal cases. Defendants in custody are not brought into the courtroom until the invocation has been completed. Judge Constangy has never held juvenile court.

Judge Constangy composed the invocation himself. He did not consult any prayer books or other religious writings in drafting it, nor did he consult members of the clergy or other individuals or religious institutions.

Judge Constangy testified without contradiction that in North Carolina, state district court "is an unusually hectic type of court," Tr. 24. Judge Constangy expressed his concern that "one of the perceptions I think that the public has about our court system is that frequently it tends to be very hectic, very disorganized," *id.*, and that the public may perceive that "the court system and lawyers are involved in a lot of tricks and games," *id.* at 25. Judge Constangy explained that he uses the opening invocation primarily "to set the proper tone and atmosphere for the court." *Id.* (Respondent Ronald Everhart confirmed that the opening invocation effectively suspended the "normal commotion" in district court. Defendant's Ex. 18 (Everhart Depo.) at 18.) Judge Constangy testified that the opening invocation served as well "to preserve the American tradition of opening deliberative bodies with an invocation and also to express a reverence for God." Tr. 25.

At least several other trial judges in North Carolina open their daily courtroom sessions with invocations. Defts. Ex. 10 (Affidavit of Senior Resident Superior Court Judge James C. Davis) at 1; Defts. Ex. 11 (Aff. of

District Court Judge William G. Ijames) at 1; Defts. Ex. 13 (Aff. of retired/recall District Judge Leonard H. Van Noppen) at 1. One of these judges testified that he has followed this practice for twenty years, Defts. Ex. 13 (Van Noppen) at 1.

The individual respondents are attorneys licensed to practice in Judge Constangy's court. Each individual respondent was an assistant public defender at the time of the filing of this lawsuit. Plaintiffs' Exs. 8-12.[4] Each individual respondent has been present for at least one recitation of Judge Constangy's court-opening invocation.

Respondent North Carolina Civil Liberties Union is a non-profit North Carolina corporation which holds itself out as being devoted to securing and defending the rights, privileges and immunities guaranteed by the United States Constitution and the Constitution of North Carolina, and as having a special interest in the rights protected by the First Amendment. A number of its members live in Charlotte and may be subject to being ordered to attend Judge Constangy's courtroom as witnesses or defendants in the same manner as any other citizen or group of citizens.

Immediately before saying the invocation, Judge Constangy always says, "Let us pause for a moment of prayer." No other verbal or written announcement is made that the court will be opened with an invocation. Judge Constangy would be willing to announce that he will say a prayer and to allow anyone in the courtroom who wished to leave the room an opportunity to do so.

Judge Constangy intended at the time of trial to continue indefinitely his practice of opening each session of court with an invocation.

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[4] One of the respondents, James Gronquist, left this position prior to the trial of this case and entered private practice. Plaintiffs' Ex. 8 (Partial Direct Testimony of James Gronquist) at 1, ¶ 1. There is no evidence in the record that respondent Gronquist any longer has occasion to appear in Judge Constangy's court.

It is undisputed that state and federal courts at all levels, including this Court, commonly open their daily sessions with an invocation of God's assistance in the form of a cry, "God save the United States (or a given state) and this Honorable Court."

B. Course of Proceedings

On November 21, 1989, respondents filed suit against Judge Constangy in the United States District Court for the Western District of North Carolina. The case went to trial on May 16, 1990, and on October 18, 1990, the district court entered its findings of fact and conclusions of law.

The district court held that Judge Constangy's courtroom invocation violated the Establishment Clause of the First Amendment. *North Carolina Civil Liberties Union v. Constangy*, 751 F. Supp. 552 (W.D.N.C. 1990) (App. 17a).

The district court rejected Judge Constangy's argument that the controlling precedent was *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court upheld the practice of the Nebraska state legislature to open each legislative day with a prayer by an official, paid chaplain. Limiting the *Marsh* decision to situations where the challenged activity reflects a "200 year-old 'unambiguous and unbroken history,'" 751 F. Supp. at 554 (App. 22a) (quoting *Marsh*, 463 U.S. at 792), the district court perceived "no comparable evidence in this case," 751 F. Supp. at 554 (App. 22a).

Applying the three-pronged *Lemon* test, *id.* at 553-54 (App. 20a-21a),[5] the district court held that Judge Constangy's invocation failed all three prongs of that standard, *id.* at 554 (App. 20a). The court held that the invocation had a religious "purpose," "advanced" religion, and impermissibly fused governmental and religious functions so as to produce "excessive government entanglement with religion." *Id.* (App. 21a). The district court concluded that the challenged invocation violated the Establishment Clause.[6]

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[5] Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government action must have a "secular purpose," *id.* at 612, must have a "principal or primary effect" that "neither advances nor inhibits religion," *id.*, and must not produce "excessive government entanglement with religion," *id.* at 613.

The district court entered an order declaring Judge Constangy's practice of "opening court with prayer" to be unconstitutional and enjoining that practice. App. 24a. The court subsequently entered a judgment to the same effect. App. 25a.

Judge Constangy appealed to the U.S. Court of Appeals for the Fourth Circuit, but that court affirmed the judgment of the district court. *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145 (4th Cir. 1991) (App. 1a).

The court of appeals, like the district court, confined the *Marsh* precedent to the "particular historical circumstances presented in that case," *id.* at 1148 (App. 7a). Perceiving "no similar long-standing tradition of opening courts with prayer," *id.*, the court of appeals held *Marsh* inapplicable to the case at bar.

The court of appeals held that Judge Constangy's invocation ran afoul of all three prongs of the *Lemon* test. *Id.* at 1149-52 (App. 9a-15a). Treating the "purpose" prong as a factual question of "Judge Constangy's actual intent," *id.* at 1150 (App. 11a), the court of appeals held that the district court's conclusion that "Judge Constangy's purpose was actually religious and not secular" was not "clearly erroneous," *id.* Treating the "primary effect" prong as a factual question of how others "perceived" Judge Constangy's invocations, *id.* at 1151 (App. 12a), the court noted the existence of testimony at trial that "persons who have heard Judge Constangy's prayer in court felt that the judge wanted those present to pray with him and felt that the judge was endorsing religion," *id.* (App. 13a). The court of appeals "agree[d]" with the district court's "finding" of a primary effect to "advance and endorse religion." *Id.* Finally, the court held that judicial invocations "necessarily" produce "an excessive entanglement of the court with religion," *id.*, because a daily invocation "results in an ongoing, day-to-day merging of judicial and religious functions," *id.* at 1152 (App. 15a). The court added that the evidence that "many people . . . are offended" at the invocation demonstrated the potential for political "divisiveness along religious lines." *Id.*

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[6] The district court's opinion concludes by announcing that the federal district judge's own religious affiliation is Scotch Presbyterian and this religion teaches a faith in "God Almighty as Father of us all and as Mentor and Protector and Law Giver of us all." *Id.* at 555 (App. 23a). The court did not attempt to explain why, under its view of the *Lemon* test, the court's inclusion of this personal profession of faith, in its official, published opinion, would not also run afoul of the Establishment Clause.

REASONS FOR GRANTING THE WRIT

The court below held unconstitutional the practice of a state trial judge to open court each day with an invocation. Respondents' standing to bring this lawsuit rests upon their status as "offended observers," a status that this Court has never held sufficient to confer standing under Article III of the Constitution. On the merits, the decision of the court below conflicts with the decision of this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the practice of opening legislative sessions with a prayer. The court below employed a sweepingly broad construction of the so-called *Lemon* test, *see Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), raising important and unsettled questions about the scope and validity of that standard for evaluating Establishment Clause claims.

This Court is currently reviewing a case presenting constitutional issues largely identical (with the exception of the standing issue) to those presented in the case at bar. *See Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991). This Court should grant the present petition and either give plenary consideration to this case subsequent to *Lee v. Weisman* or, in the alternative, vacate the judgment below and remand this case for further consideration in light of the decision in *Lee*.

I. THE CONCEPT OF "OFFENDED OBSERVER" STANDING UPON WHICH RESPONDENTS' SUIT RESTS CONFLICTS WITH THE DECISIONS OF THIS COURT.

Respondents challenge, under the Establishment Clause, the custom of petitioner Judge Constangy to recite an invocation each day at the opening of court. Respondents' lawsuit ultimately rests, as a threshold matter, on the claim that anyone who takes offense at a perceived violation of the Establishment Clause has standing to sue under Article III of the Constitution. This proposition is entirely at odds with the precedents of this Court.

None of the respondents (plaintiffs in the district court) have standing to sue in the case at bar.

A. The Organizational Respondent Lacks Standing.

The organizational respondent, the North Carolina Civil Liberties Union Legal Foundation (NCCLU), asserts a "special interest in the rights protected by the First Amendment," Complaint at 2, ¶ 5 (App. 27a), but alleges no injury to itself as an organization. As a result, this respondent can claim no standing apart from the standing of its members. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 476 n.14 (1982). The NCCLU alleges that some of its members reside in Charlotte and are "subject to attending Judge Constangy's courtroom and being forced to listen to his prayer." Complaint at 2, ¶ 5 (App. 27a). But the purely speculative prospect that some NCCLU member may be involved in court proceedings, that those proceedings may be in district court, that Judge Constangy may preside, and that the NCCLU member may be present for the invocation at the opening of court in the morning, is patently insufficient to support standing for any given NCCLU member. *Los Angeles v. Lyons*, 461 U.S. 95 (1983). The NCCLU therefore cannot claim standing on the basis of representation of such hypothetical interests.[7]

B. The Individual Respondents Lack Standing.

The respondent individuals are assistant public defenders who practice in the court in which Judge Constangy sits.[8] These respondents aver that they are state taxpayers, but respondents make no explicit claim to taxpayer standing.[9] Rather, these individuals allege that they are "offended" by, or "disagree" with, the content of

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[7] One of the individual respondents, Sharon Samek, is a member of the NCCLU, Plaintiffs' Ex. 10 (Partial Direct Testimony of Sharon Samek) at 1, ¶ 1. As discussed below, she lacks standing in her own right, and thus the NCCLU cannot ride piggyback on her claim.

[8] One of the respondents has left his position as public defender and is now in private practice. Plaintiffs' Ex. 8 (Partial Direct Testimony of James Gronquist) at 1. There is no evidence that this respondent any longer has occasion to appear in Judge Constangy's court or has any other even colorable claim to standing.

[9] Nor would respondents have standing as state taxpayers. A taxpayer's action meets the standing requirements of Article III "only when it is a good-faith pocketbook action." *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952). *Accord Flast v. Cohen*, 392 U.S. 83, 102 (1968) (taxpayer must challenge an exercise of the spending power); *Valley Forge*, 454 U.S. at 478, 480 (same). Judge Constangy's invocation is plainly not an expenditure of state funds within the meaning of *Doremus*; hence, respondents' "grievance . . . is not a direct dollars-and-cents injury but is a religious difference," *Doremus*, 342 U.S. at 434, and taxpayer standing is unavailable to respondents.

Judge Constangy's daily invocation. These assertions are insufficient to confer standing.

The respondents allege that they "object" to Judge Constangy's practice of opening court with an invocation, Complaint at 2, ¶ 7 (App. 27a), that they "believe" this practice is unconstitutional, *id.* at 3, ¶ 7 (App. 27a), and that they are "offended" by this practice, *id.* (App. 28a). This is no more than an assertion of "offended observer" status. As "offended observers," respondents have asserted no greater "injury" than that which any citizen suffers who takes offense at, or disagrees with, some allegedly illegal government action—be it the conduct of CIA activities in Central America, for example, or the administration of a national welfare system.

This Court has never held that an adult[10] individual who takes offense at, or disagrees with, the action of a government official has, on that basis alone, standing to challenge that action. The "psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms." *Valley Forge*, 454 U.S. at 485-86.

Respondents allege that they have inconvenienced themselves in order to avoid hearing the challenged invocation. Complaint at 3-4, ¶¶ 8-12 (App. 28a). But an "offended observer" cannot manufacture standing simply by taking steps to alleviate the subjective "offense" in question. Altering one's schedule, changing one's route, engaging in competing activities, or simply wilfully ignoring the disagreeable activity are all steps which respondents are free to take. These voluntary maneuvers, however, do not constitute "injury" but rather efforts to *mitigate* or *avoid* the perceived "injury."

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[10] Different concerns arise when impressionable youth are the captive audience of an adult authority figure—e.g., in a classroom—at least in the absence of a neutralizing parental presence. The injury in such a situation, for purposes of Article III standing, is not merely subjective "offense" but a direct invasion of the right of parents to direct the upbringing of their children. The case at bar, however, does not involve children.

Respondents may argue that unless they can enjoy "offended audience" standing, no one can bring an Establishment Clause challenge to religious speech by government officials. But "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974) (citation omitted).

> In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of [the elected branches of government], and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of [government] by means of lawsuits in federal courts.

United States v. Richardson, 418 U.S. 166, 179 (1974).

The concept of "offended observer" standing, moreover, knows no bounds. Nor would an "exception" for the Establishment Clause be any exception at all. If respondents were to have standing to challenge Judge Constangy's invocation simply because they heard and objected to the content of that invocation, then government sound and camera crews, secret service agents, pages, teleprompter technicians, and countless other people whose employment places them within earshot of public officials would also have standing to challenge perceived Establishment Clause infractions in the speeches of federal and state officials, from President Bush on down. There is nothing so inherently extraordinary about an

Establishment Clause claim that would warrant such a wholesale departure from normal principles of standing.[11]

This is not a case in which a taxpayer complains of the misuse of funds extracted from him by mandatory taxation. Nor is this a case of parents complaining on behalf of captive children exposed to objectionable indoctrination. The instant lawsuit presents a case of "offended observers"—nothing more.

This Court should grant the present petition to review the dramatic expansion of standing entailed in the decision of the court below.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *MARSH v. CHAMBERS*.

The court below held unconstitutional the practice of petitioner Judge Constangy to open daily sessions of court with an invocation. This decision conflicts with the decision of this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983).

In *Marsh*, this Court upheld the practice of a state legislature to open each legislative day with a prayer by a paid chaplain. This Court relied heavily upon the fact that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." 463 U.S. at 786. "In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied . . . —their actions reveal their intent." *Id.* at 790.

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[11] This Court gives no credence whatever to "offended observer" arguments under the Free Speech Clause of the First Amendment. *E.g.*, *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"). It would be highly ironic, to say the least, were such audience offense or disagreement nevertheless to constitute a cognizable injury for purposes of Article III standing.

This Court observed in *Marsh* that the framers of the First Amendment "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's official seal of approval on one religious view," *id.* at 792 (internal quotation marks and citation omitted); rather, the framers merely considered "invocations as conduct whose [sic] effect harmonized with the tenets of some or all religions," *id.* (internal quotation marks, ellipses, and citation omitted). Thus, this Court "conclude[d] that legislative prayer presents no more potential for establishment" than practices previously upheld, such as grants for higher education at religious institutions and tax exemptions for religious organizations. *Id.* at 791 (citations omitted).

The court of appeals in the present case viewed *Marsh* as limited to the "particular historical circumstances presented in that case." 947 F.2d at 1148 (App. 7a). Perceiving "no similar long-standing tradition of opening courts with prayer," *id.*, the court below held that *Marsh* does not govern courtroom invocations. The court of appeals added that, in its view, "judicial prayer" has a "greater potential for an establishment of religion than legislative prayer." *Id.* at 1149 (App. 8a).

The court of appeals erred on both counts.

A. The Historical Record Supports the Practice of Opening Court with an Invocation of Divine Assistance.

As a historical matter, the invocation of God's assistance is not a practice foreign to the judiciary. "There is an unbroken history of official acknowledgment *by all three branches of government* of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (emphasis added). All who attend sessions of this Court are familiar with the daily invocation of Divine Aid in the opening cry, "God save the United States and this Honorable Court." *See Marsh*, 463 U.S. at 786.[12] And very early historical records confirm that it was a common practice for federal courts to open official business with invocations delivered by clergymen.

In early 1790, in anticipation of the arrival of Supreme Court Justices travelling around the new United States as Circuit Justices, federal district judge Richard Law of Connecticut wrote inquiring whether the Circuit Justices "would wish to have a Clergiman attend as Chaplin, as has been generally the Custom in the New England States, upon such Occasions." Letter from Richard Law to John Jay (Feb. 24, 1790), in *The Documentary History of the Supreme Court of the United States, 1789-1800* [hereafter *Documentary History*] at 11 (1988). Chief Justice John Jay responded as follows: "The custom in New England of a clergyman's attending, should in my opinion be observed and continued." Letter from John Jay to Richard Law (Mar. 10, 1790), in *Documentary History* at 13.

Recorded instances of this practice of opening federal circuit court sessions with clergy invocations are plentiful:

a. On May 3, 1790, Circuit Court opened in Boston, Massachusetts, with Chief Justice Jay and Associate Justice Cushing in attendance. After the grand jury was sworn in and Chief Justice Jay gave the jurors their charge, "the throne of grace was addressed in a well adapted prayer by the Rev. Dr. Howard" (a minister of the Congregational Church).[13] The court then entertained bar admissions. *Herald of Freedom*, May 4, 1790, in *Documentary History* at 60-61.

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[12] This practice dates back at least to the tenure of Chief Justice Marshall. *See* C. Warren, *The Supreme Court in United States History* 468 (1926) (describing argument session in 1827).

[13] The phrase "throne of grace" apparently derives from the New Testament. *See* Heb. 4:16.

b. On November 3, 1790, Circuit Court opened in Boston, again with Chief Justice Jay and Associate Justice Cushing in attendance. "After the usual forms were gone through with, and the Grand-Jury impanelled, an excellent CHARGE was given them, by the Chief Justice, and the Throne of Grace was addressed in prayer, by the Rev. Dr. Stillman" (a Baptist pastor). *Documentary History* at 104-05 (internal quotation marks and footnote omitted). *See also* Letter from Henry Jackson (one of the jurors) to Henry Knox (Nov. 7, 1790) ("Doct[or] Stillman gave us a most sublime Prayer on the occasion"), in *Documentary History* at 106.

c. On May 12, 1791, Circuit Court opened in Boston, again with Chief Justice Jay and Associate Justice Cushing in attendance. The Chief Justice opened with "a short and elegant extempore Charge," and "[t]he Throne of Grace was then addressed in prayer, by the Rev. Mr. West." The court then entertained bar admissions. *Columbian Centinel*, May 14, 1791, in *Documentary History* at 164-65.

d. On May 24, 1791, Circuit Court opened in Portsmouth, New Hampshire, with Chief Justice Jay and Associate Justice Cushing in attendance. After the charge to the grand jury, "the throne of Grace was addressed by the Rev. Dr. Haven" (a Congregationalist minister). *Documentary History* at 192.

e. On November 14, 1791, Circuit Court opened in Boston with Chief Justice Jay in attendance. After the charge to the grand jury, "the Rev. Mr. Belknap addressed the Throne of Grace in prayer." *Columbian Centinel*, Nov. 16, 1791, in *Documentary History* at 231-32.

f. On May 12, 1792, Circuit Court opened in Boston with Chief Justice Jay and Associate Justice Cushing in attendance. After the grand jury charge on May 14, 1792, "[t]he prayer was made by the Rev. Dr. Parker" (minister of Boston's Trinity Church). The Vice President of the United States was present. *Documentary History* at 276-77.

g. On October 15, 1792, Circuit Court opened in Boston, with Associate Justice Iredell in attendance. "After the Rev. Dr. Lathrop had addressed the throne of Grace, in prayer, the Hon. Judge Iredell gave an elegant charge to the jury, and the business of the session commenced." *Columbian Centinel*, Oct. 17, 1792, in *Documentary History* at 317 (footnoted omitted).

h. On June 7, 1793, Circuit Court opened in Boston with Associate Justice Wilson in attendance. "After the Charge, the Rev. Dr. Thacher addressed the throne of Grace, in prayer." *Columbian Centinel*, June 8, 1793, in *Documentary History* at 406.

i. On June 19, 1793, Circuit Court opened in Newport, Rhode Island, with Associate Justice Wilson in attendance. "When the Rev. Mr. Patten addresed the Throne of Grace in Prayer—After which the Hon. Judge Wilson delivered to the Grand Jury a Charge . . . ." *Newport Mercury*, June 25, 1793, in *Documentary History* at 412 (footnote omitted).

j. On November 14, 1793, Circuit Court opened in Providence, Rhode Island, with Associate Justice Wilson in attendance. "The Throne of Grace was addressed in a Prayer well adapted to the Occasion, by the Rev. James Wilson, Co-Pastor of the Congregational Church on the West Side of the River," after which the grand jury received its charge. *Providence Gazette*, Nov. 16, 1793, in *Documentary History* at 430 (footnote omitted).

k. On June 19, 1794, Circuit Court opened in Newport, Rhode Island, with Associate Justice Wilson in attendance. "On June 20, the Court was opened with Prayer, by the Rev. Mr. Patten," after which Justice Wilson charged the grand jury. *Documentary History* at 475.

l. On November 7, 1794, Circuit Court opened in Providence, Rhode Island, with Associate Justice Cushing in attendance. "The Rev. Dr. Hitchcock addressed the Throne of Grace in a Prayer," after which Justice Cushing charged the grand jury. *Providence Gazette*, Nov. 8, 1794, in *Documentary History* at 496.

m. On May 19, 1800, Circuit Court opened in Portsmouth, New Hampshire, with Associate Justice Patterson in attendance. "After the Jury were empaneled, the Judge delivered a most elegant and appropriate Charge . . . —*Religion & Morality* were pleasingly inculcated and enforced, as being necessary to good government, good order and good laws, for 'when the righteous are in authority, the people rejoice.'"[14] *United States Oracle*, May 24, 1800, in *Documentary History* at 436. "After the Charge was delivered, the Rev. Mr. Alden addressed the Throne of Grace, in an excellent, well adapted prayer." *Id.* (footnote omitted).

Plainly, the members of this Court sitting immediately after the adoption of the Constitution and the Bill of Rights considered clergy invocations at the opening of federal court sessions entirely consistent with the Establishment Clause of the First Amendment. The court of appeals erred in distingushing *Marsh v. Chambers* on historical grounds.

B. Judicial Invocations Pose No Greater Threat of Establishment than Legislative Invocations.

The court below also erred in concluding that judicial invocations possess an inherently greater potential for establishment of religion than legislative invocations.

First of all, in both cases there is simply "no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Marsh*, 463 U.S. at 791. The "danger" posed by opening invocations is

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[14] The quotation comes from the Old Testament. *See* Prov. 29:2.

"mere shadow," not "real threat," *id.* at 795, and it therefore makes no sense to compare "mere shadows" to see which is more insignificant.

Second, the judgment expressed in the text of the First Amendment is, if anything, precisely the opposite of that reached by the court below. "*Congress* shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I (emphasis added). The constitutional text explicitly focuses on the legislature, not the executive or the judiciary. This makes perfect sense in a system, like that of this nation, in which the legislature is the sole lawmaking authority. If a court may only interpret and apply laws (subject to correction by the legislature), and if the executive may only enforce and apply laws (subject to restraint by the legislature), then the only true threat of a "law respecting an establishment of religion" rests with the legislature. Even a judge who *wanted* to make a law establishing a religion would simply lack the institutional capacity to do so.

The court of appeals had no valid basis for distinguishing *Marsh v. Chambers*. The decision of the court below therefore squarely conflicts with *Marsh*.

III. THIS CASE RAISES IMPORTANT AND UNSETTLED QUESTIONS REGARDING THE "*LEMON* TEST" UNDER THE ESTABLISHMENT CLAUSE.

The court below employed the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in holding unconstitutional petitioner Judge Constangy's practice of opening court with a brief, nonsectarian invocation. The decision of the court of appeals therefore raises two substantial and unsettled questions: first, whether the *Lemon* test forbids any action with religious significance by a government official; and second, whether the *Lemon* test is a valid means of applying the Establishment Clause.

A. Does the *Lemon* Test Strictly Forbid Any Action with Religious Significance on the Part of Government Officials?

The *Lemon* test provides that government action challenged under the Establishment Clause, to be constitutional, must have a "secular purpose," 403 U.S. at 612, must have a "principal or primary effect" that "neither advances nor inhibits religion," *id.*, and must not produce "excessive government entanglement with religion," *id.* at 613.

The court of appeals in the present case interpreted the *Lemon* test in a manner that would essentially forbid any action with religious significance by a government official.

1. *The court below construed the "purpose" prong to forbid subjective religious motivation.*

The court of appeals construed the "purpose" prong of *Lemon* to require a factual inquiry into "Judge Constangy's actual intent," 947 F.2d at 1150 (App. 11a). The court upheld as not "clearly erroneous" the district court's finding that "Judge Constangy's purpose was actually religious and not secular." *Id.*

For the purpose prong of the *Lemon* test to make any sense, however, the relevant inquiry must be into the *objective purpose* of the activity in question, not the *subjective motivations* of the actors. An otherwise unobjectionable practice does not become unconstitutional just because the actor happens to possess religious motivations. For the truly religious person, *every* act—including the fulfillment of public duties—will have a "religious purpose." But if *Lemon* forbids such motivations, then it will be impossible for a devout individual to hold public office. *Lemon*, in short, would impose an absolute bar to public service by religious individuals, in direct contradiction of the Constitution. *See* U.S. Const. art. VI, cl. 3 (no religious test for public office); *id.* amend. I (no law prohibiting free exercise of religion). *See also McDaniel v. Paty*, 435 U.S. 618 (1978) (unconstitutional to bar ministers from holding public office).

The constitutionality of a statute does not depend upon a psychoanalysis of the legislators: "what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356, 2371 (1990) (plurality). In the same way, the constitutionality of Judge Constangy's invocation does not depend upon a dissection of his soul.[15]

The court of appeals went on to suggest that an invocation, as a form of prayer, is "intrinsically religious" and therefore virtually *per se* unconstitutional under *Lemon*'s purpose prong. 947 F.2d at 1150 (App. 11a). This position, however, directly contradicts this Court's holding in *Marsh*, which upheld legislative prayer.

Judge Constangy articulated a clearly legitimate, secular purpose for his invocation: a desire to "produce a calm, quiet, serious atmosphere in the courtroom for the day." Tr. 54. His invocation, like all invocations at public events, serves the obvious secular purposes of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). This is enough to satisfy the "purpose" prong, which bars government action "only if it is motivated *wholly* by an impermissible purpose," *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (emphasis added).

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[15] The invasive personal cross-examination of Judge Constangy by respondents' counsel demonstrates clearly why the purpose prong cannot legitimately require a subjective inquiry. *See* Plaintiffs' Ex. 13 (Depo. of Judge Constangy) at 21-38. Any "test" that requires a public official to give his personal definition of religion, *id.* at 24, to identify and describe God, *id.* at 27-29, to give his views on the merits of religion, *id.* at 31-32, and to define religious terms, *id.* at 33-39, is itself both deeply offensive and patently unconstitutional.

2. *The court below construed the "primary effect" prong to confer a "heckler's veto" on offended observers.*

The court of appeals construed the "primary effect" prong of *Lemon* to require a factual inquiry into how Judge Constangy's invocation "was perceived" by others. 947 F.2d at 1151 (App. 12a). The court upheld the district court's "finding" of a primary effect to "advance and endorse religion" because "testimony at trial showed that persons who have heard Judge Constangy's prayer in court felt that the judge wanted those present to pray with him and felt that the judge was endorsing religion." *Id.* (App. 13a).

A challenged action will always violate the "effect" prong, however, if all that is necessary is for a sufficiently fastidious nonbeliever to perceive the challenged action as an endorsement of religion. Indeed, under this "heckler's veto" version of the "effect" test, any plaintiff raising an Establishment Clause claim will automatically prevail unless the court is prepared to dismiss the plaintiff's objections as incredible, dishonest, or somehow not worthy of consideration. The assurance of the court below that the cry, "God save this Honorable Court," and the motto, "In God We Trust," are secure from attack because they have "no theological . . . impact," *id.* (internal quotation marks and citation omitted), is disingenuous—there is no principled way of distinguishing the complaint of the scrupulous atheist who takes offense at these traditional invocations.

In a society like this one, in which invocations and benedictions are standard fare at public occasions, it is unrealistic to view the nonsectarian invocation of a North Carolina trial judge as having an objective "primary effect" of advancing religion. To hold otherwise would be to incorporate a strict atheistic perspective into the First Amendment.

3. *The court below construed the "entanglement" prong as forbidding government officials from engaging in any activity with religious significance.*

The court of appeals construed the "entanglement" prong of *Lemon* to forbid identifiably religious activity by a public official, particularly a judge. The court held that Judge Constangy's daily invocation unconstitutionally produced "an ongoing, day-to-day merging of judicial and religious functions." 947 F.2d at 1152 (App. 15a). The court further held that because "many people . . . are offended' by the invocation, there is an unconstitutional "potential for entangling the state in divisiveness along religious lines," *id.*

The *Lemon* test, however, forbids "excessive entanglement between *church* and state," *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (emphasis added), not between "*religion* and state." The court of appeals applied the wrong test when it held that Judge Constangy's prayer produced an "excessive entanglement of the court with *religion*," 947 F.2d at 1151 (App. 13a) (emphasis added). In the name of "complete neutrality," *id.*, the court below insisted upon what Justice Kennedy has described as "a relentless extirpation of all contact between government and religion." *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring and dissenting). As Justice Goldberg warned nearly thirty years ago, "untutored devotion to the concept of neutrality can lead to . . . a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution but, it seems to me, are prohibited by it." *School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

The present case involves no church, parochial school, or other religiously affiliated institution. There is accordingly no possibility that Judge Constangy's invocation will "intrude unduly in the day-to-day operation of . . . religiously affiliated [entities]," *Bowen*, 487 U.S. at 616, or that such entities will intrude into Judge Constangy's official business. The "entanglement" prong simply has no relevance to the case at bar.

The court of appeals also held that an "entanglement" violation arose from potential political "divisiveness along religious lines." 947 F.2d at 1152 (App. 15a). But this Court has repeatedly held that, aside from the case of a direct subsidy to a religious institution, "no inquiry into political divisiveness is even called for." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987) (internal quotation marks and citation omitted). The present case involves no subsidy, and hence no "divisiveness" inquiry ever arises.

As the foregoing discussion illustrates, the court of appeals in the case at bar expanded the *Lemon* test beyond all recognizable proportions. Under this super-*Lemon* test, the action of a government official is unconstitutional if: 1) the official has any personal religious motivations (the "purpose" prong); 2) any observer, even a hypersensitive viewer, perceives an offensive endorsement of religion (the "effect" prong); or, 3) the reviewing court or any other observer perceives religious significance in the challenged action (the "entanglement" prong).

Under this strict separationist version of *Lemon*, *any* public invocation—including the legislative prayer upheld in *Marsh*—would be clearly unconstitutional. Presidential proclamations that mention God (such as Thanksgiving proclamations and declarations of national days of prayer) would violate at least two and possibly all three prongs of this super-*Lemon* test. Any judge or other government official who dared to wear a Jewish yarmulke, or ashes on Ash Wednesday, or any other religious garb, jewelry, or the like, would violate all three prongs of the test. Even scheduling judicial or legislative hearings to accommodate the observance of religious holidays would violate all three prongs of this super-*Lemon* test.[16]

This extreme nature of this construction of *Lemon* (and the First Amendment) calls for review by this Court.

B. Is the *Lemon* Test a Valid Interpretation of the Establishment Clause?

The extreme application of the *Lemon* test by the court below raises the recurrent, important, and unsettled question whether the *Lemon* test in fact comports faithfully with the Establishment Clause of the First Amendment.

Criticism of the *Lemon* test among the members of this Court has grown steadily over the two decades since its original formulation. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring in judgment) ("the standards announced in *Lemon* should be reexamined and refined"); *id.* at 91 (White, J., dissenting) ("I would support a basic reconsideration of our precedents"); *id.* at 91-114 (Rehnquist, J., dissenting) (thorough historical critique of *Lemon* and "wall of separation" metaphor); *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (urging abandonment of *Lemon* "purpose" prong); *Bowen v. Kendrick*, 487 U.S. 589, 616 (1988) (and cases cited) (noting heavy criticism of *Lemon* "entanglement" prong); *County of Allegheny v. American Civil Liberties Union Pittsburgh Chapter*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring and dissenting) (and cases cited) (noting criticism of *Lemon* framework). Currently, the Court is reviewing a case, *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991), that may provide the occasion for a revision or rejection of the *Lemon* test.

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[16] Indeed, under the rationale of the court below, it would be unconstitutional for Judge Constangy to recite the invocation, "God save the State and this Honorable Court." It would therefore also be unconstitutional for the bailiff—a government official—to cry a similar invocation, whether in North Carolina or in this Court.

The case at bar presents an opportunity for this Court to clarify the status and scope of the *Lemon* test under the Establishment Clause. As illustrated in the preceding section, the decision below rests upon an expansive and extreme interpretation of the *Lemon* test; the scope and validity of the *Lemon* test is directly at issue.

This Court should grant review to examine the status and scope of the *Lemon* test under the Establishment Clause.

IV. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT REVIEW, VACATE THE DECISION BELOW, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *LEE v. WEISMAN*.

Aside from the important threshold standing question, which independently merits review, the present petition raises issues that substantially overlap the issues pending before this Court in the case of *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991). This Court should therefore either grant plenary review in the instant case or, in the alternative, grant the present petition, vacate the decision below, and remand this case for further consideration in light of *Lee v. Weisman*.

The petition for certiorari in the case at bar raises the question whether the Establishment Clause forbids a state trial judge from opening court with a daily invocation. Crucial to the resolution of this case is the relevance, scope, and status of the three-part *Lemon* test for evaluating claims under the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See also* 947 F.2d at 1149-52 (App. 9a-15a) (application of *Lemon* test by court of appeals).

The pending case of *Lee v. Weisman* presents largely overlapping constitutional questions. *Lee* involves the permissibility, under the Establishment Clause, of a clergy invocation at a public school graduation ceremony. The questions presented in *Lee* are the following:

(1) Do school authorities violate Establishment Clause by allowing speaker at a public school or high school graduation ceremony to offer invocation and benediction that acknowledge deity?

(2) Is direct or indirect government coercion necessary element of Establishment Clause violation?

This Court's disposition of the *Lee* case will obviously have very significant implications for the present litigation. The decision in *Lee* will likely provide a clarification, and possibly a revision, of the *Lemon* test. In addition, *Lee* will specifically consider the status of public invocations under the Establishment Clause.

In short, the forthcoming decision of this Court in *Lee v. Weisman* should provide the most recent, authoritative statement on the meaning of the Establishment Clause, particularly as applied to public invocations. Given that the present case also involves the application of the Establishment Clause to public invocations, resolution of the case at bar should not be divorced from the pending *Lee* case.

This Court should hold the present petition pending disposition of *Lee*, and thereupon either grant plenary consideration of the present case or simply grant the petition, vacate the decision of the Fourth Circuit, and remand this case for further consideration in light of the decision of this Court in *Lee v. Weisman*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fourth Circuit or, in the alternative, grant the petition, vacate the decision of the court of appeals, and remand this case for further consideration in light of the decision of this Court in *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991).

Respectfully submitted,

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January 21, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90-1880

NORTH CAROLINA CIVIL LIBERTIES UNION LEGAL FOUNDATION; PHILIP F. HOWERTON, JR.; KATHLEEN M. ARUNDELL; SHARON SAMEK; RONALD EVERHART; JAMES GRONQUIST,

Plaintiffs-Appellees,

v.

H. WILLIAM CONSTANGY,

Defendant-Appellant,

THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS; THE RUTHERFORD INSTITUTE; CONCERNED WOMEN FOR AMERICA LEGAL FOUNDATION; THE AMERICAN JEWISH CONGRESS; THE ANTI-DEFAMATION LEAGUE,

Amici Curiae.

No. 90-1881

NORTH CAROLINA CIVIL LIBERTIES UNION LEGAL FOUNDATION; PHILIP F. HOWERTON, JR.; KATHLEEN M. ARUNDELL; SHARON SAMEK; RONALD EVERHART; JAMES GRONQUIST,

Plaintiffs-Appellees,

v.

H. WILLIAM CONSTANGY,

Defendant-Appellant,

THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS; THE RUTHERFORD INSTITUTE; CONCERNED WOMEN FOR AMERICA LEGAL FOUNDATION; THE AMERICAN JEWISH CONGRESS; THE ANTI-DEFAMATION LEAGUE,

Amici Curiae.

Appeals from the United States District Court
for the Western District of North Carolina, at Charlotte.
James B. McMillan, Senior District Judge.

(CA-89-438-C-C-M)

Argued: May 6, 1991

Decided: October 23, 1991

Before MURNAGHAN and SPROUSE, Circuit Judges,
and MURRAY, Senior United States District Judge for
the District of Maryland, sitting by designation.

Affirmed by published opinion. Senior Judge Murray wrote the opinion, in which Judge Murnaghan and Judge Sprouse joined.

COUNSEL

ARGUED: Norma S. Harrell, Special Deputy Attorney General, Raleigh, North Carolina; Robert Adams Singer, BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, Greensboro, North Carolina, for Appellant. George Daly, Charlotte, North Carolina, for Appellees. ON BRIEF: Lacy H. Thornburg, Attorney General of North Carolina, Raleigh, North Carolina; James Thomas Williams, Jr., BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, Greensboro, North Carolina, for Appellant. Charles E. Johnson, MOORE & VAN ALLEN, Charlotte, North Carolina; James Wyatt, Charlotte, North Carolina; William Simpson, Legal Director, NORTH CAROLINA CIVIL LIBERTIES UNION LEGAL FOUNDATION, INC., Raleigh, North Carolina, for Appellees. Jay Alan Sekulow, James M. Henderson, Sr., Walter Weber, FREE SPEECH ADVOCATES, Washington, D.C.; Mark N. Troobnick, Jordan W. Lorence, Cimron Campbell, CONCERNED WOMEN FOR AMERICA, Washington, D.C., for Amicus Curiae Concerned Women for America Legal Foundation. Larry L. Crain, Brentwood, Tennessee, for Amicus Curiae The Rutherford Institute. Douglas W. Davis, Virginia Beach, Virginia; Stephen H. Galebach, General Counsel, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, Washington, D.C.; Thomas Patrick Monaghan, New Hope, Kentucky; Charles E. Rice, NOTRE DAME LAW SCHOOL, Notre Dame, Indiana, for Amicus Curiae The Catholic League for Religious and Civil Rights. Marc D. Stern, Amy Adelson, Lois C. Waldman, AMERICAN JEWISH CONGRESS, New York, New York, for Amicus Curiae The American Jewish Congress. Murray J. Janus, BREMNER, BABER & JANUS, Richmond, Virginia; Ruth L. Lansner, Jeffrey P. Sinensky, Steven M. Freeman, Tamar Sadeh Ellison, ANTI-DEFAMATION LEAGUE, New York, New York, for Amicus Curiae Anti-Defamation League.

OPINION

MURRAY, Senior District Judge:

Plaintiffs, the North Carolina Civil Liberties Union and several individual attorneys, brought this Establishment Clause challenge against the Honorable H. William Constangy, a judge of the Twenty-Sixth Judicial District of North Carolina, to permanently enjoin him from opening court with prayer. After a bench trial, the district court enjoined the prayer, ruling that Judge Constangy's practice violated the Establishment Clause. Appellant the Honorable H. William Constangy appeals the district court's ruling.

I.

The stipulations and the uncontested facts established at trial reveal that after the bailiff would cry him on, Judge Constangy would sit down, turn on a light at his bench, and say, "Let us pause for a moment of prayer." The judge would then bow his head and recite aloud the following prayer:

> O Lord, our God, our Father in Heaven, we pray this morning that you will place your divine guiding hand on this courtroom and that with your mighty outstretched arm you will protect the innocent, give justice to those who have been harmed and mercy to us all. Let truth be heard and wisdom be reflected in the light of your presence with us here today. Amen.

App. 73, 114, 310. Judge Constangy sits in state court and handles primarily criminal misdemeanors. He has been a judge since March, 1989, and has opened court with this prayer since May, 1989.

The district court ruled that the Supreme Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding legislative prayer did not apply to this case. The district court applied the three part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, a practice that fails any part of the following three part test is unconstitutional:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'

Id. at 612-613 (citations omitted). The district court held that Judge Constangy's prayer failed all three parts of the *Lemon* test: the purpose of Judge Constancy's prayer was religious rather than secular, the prayer did advance religion; and the prayer excessively entangled the government with religion. We agree that the *Lemon* test should be applied to this case and that the prayer at issue violates that test.

II.

The Establishment Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, commands that a state "shall make no law respecting an establishment of religion." U.S. Const. amend. I. "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years." *Lemon*, 403 U.S., at 612.

At the outset, we consider whether the reasoning of *Marsh v. Chambers*, 463 U.S. 783 (1983), should apply to this case. In *Marsh v. Chambers*, the Supreme Court was presented with the question of whether the Nebraska legislature's long-standing practice of opening its legislative sessions with a prayer by a chaplain paid by the State violated the Establishment Clause. The Court noted that sessions of Congress have opened with prayer for over two hundred years, and that the Nebraska legislature has opened with prayer for over one hundred years. Moreover, the Court found that in this case historical evidence shed light on the Framers' intent in drafting the Establishment Clause. In particular, the Court observed that the First Congress established the practice of opening Congress with prayer soon after the Constitution and the Establishment Clause were drafted. Thus, the Court reasoned:

> This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision for school transportation, beneficial grants for higher education, or tax exemptions for religious organizations.

Marsh, 463 U.S., at 791 (citations omitted). The Supreme Court reasoned that "[in] light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id.* at 792. Thus, legislative prayer is not an establishment of religion but rather, "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*

Judge Constangy argues that prayer by a judge is analogous to legislative prayer, and under the holding of *Marsh* it does not violate the Establishment Clause. In support of his argument, Appellant points out that the Supreme Court said:

> The opening of sessions of legislative and *other deliberative public bodies* with prayer is deeply embedded in the history and tradition of this country.

Id. at 786 (emphasis added). However, the next sentence states that "the practice of legislative prayer has coexisted with the principles of disestablishment of religion and religious freedom." *Id.* The opinion in *Marsh* clearly focuses on legislative prayer and its "unique history." In a later decision, the Supreme Court explained its reasoning in *Marsh*:

> The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers*, 463 U.S. 783 (1983), where the Court held that the Nebraska Legislature's practice of opening a session with prayer by a chaplain paid by the State did not violate the Establishment Clause. The Court based its conclusion in that case on the historical acceptance of the practice.

Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987). The Court did not apply the *Lemon* test because it "did not . . . consider that analysis relevant in *Marsh v. Chambers*." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (citation omitted). While the Supreme Court has "repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area," *id.*, the *Lemon* "trilogy of tests has been applied regularly in the Court's later Establishment Clause cases." *County of Allegheny* *v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989).

In its most recent Establishment Clause decision, a majority of the Court held in *Allegheny County* that a creche display bearing a patently Christian message in the Allegheny County Courthouse failed the *Lemon* test. Justice Kennedy's opinion, concurring in part and dissenting in part, which was joined by Chief Justice Rehnquist, and Justices White and Scalia, also applied the *Lemon* test, while pointing out that it should not be the primary guide in this area, but concluded that the display did not violate the Establishment Clause. The various opinions in *Allegheny* shed light on the *Marsh* decision. The opinion of the Court, written by Justice Blackmun and joined by Justices Brennan, Marshall, O'Connor, and Stevens, states:

> In *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. Justice Kennedy, however, argues that *Marsh* legitimates all "practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding." . . . *Marsh* plainly does not stand for the sweeping proposition Justice Kennedy apparently would ascribe to it, namely, that all accepted practices 200 years old and their equivalents are constitutional today.

Id. at 602-603 (citation omitted). Thus, the Supreme Court sees the holding of *Marsh* to be predicated on the particular historical circumstances presented in that case. Unlike legislative prayer, there is no similar long-standing tradition of opening courts with prayer. Nor is there any evidence regarding the intent of the Framers of the Bill of Rights with regard to the opening of court with prayer. Appellant states that certain other state court judges in North Carolina open court with prayer. App. 187, 189.

Appellant also cites several cases in which judges had prayed in court but where no First Amendment challenge was presented. However, a few examples of judges who open court with prayer is hardly comparable to the common practice of opening sessions of legislatures with prayer.

Even under Justice Kennedy's broader reading of *Marsh* it would be difficult to say that prayer by a judge in the courtroom is comparable to legislative prayer. In his opinion in *Allegheny*, Justice Kennedy states:

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather than the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.

Allegheny, 492 U.S., at 670 (citation omitted) (Kennedy, J., concurring in part and dissenting in part). Judicial prayer in the courtroom is not legitimated under the Establishment Clause by past history or present practice. Moreover, it cannot be said that judicial prayer has no greater potential for an establishment of religion than legislative prayer. A judge opening court with prayer presents an issue that is markedly different from a chaplain opening legislative sessions with prayer. First, legislative prayer is primarily directed at the legislators themselves, who have decided to have prayer. The Supreme Court commented in *Allegheny*:

> It is worth noting that just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. See *post*, at 672-673. Legislative prayer does not urge citizens

> to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct.

Allegheny, 492 U.S., at 603 n.52. In contrast to legislative prayer, a judge's prayer in the courtroom is not to fellow consenting judges but to the litigants and their attorneys. Moreover, a judge presiding over a court is the court. For a judge to engage in prayer in court entangles governmental and religious functions to a much greater degree than a chaplain praying before the legislature. Most importantly, unlike judges, legislators do not have an obligation to be neutral. A legislature is by its very nature partisan and political. Legislators are elected representatives and have a duty to support the interests and viewpoints of their constituents. Thus, in marked contrast to a judge, a legislator has the role of advocate. Because a judge must be a neutral decisionmaker, prayer in court by a judge has far more potential for establishing religion than legislative prayer.

III.

Having concluded that the decision in *Marsh v. Chambers* does not require a ruling that judicial prayer does not violate the Establishment Clause, we proceed to analyze this case under the principles of *Lemon v. Kurtzman*. Under the *Lemon* analysis, to be permissible under the Establishment Clause, the practice must have a secular purpose, must neither advance nor inhibit religion in its primary or principal effect, and must not foster an excessive entanglement with religion. 403 U.S., at 612-613.

A.

We first look to the question of whether the challenged action has a secular purpose. "In applying the purpose test, it is appropriate to ask 'whether the government's actual purpose is to endorse or disapprove of religion.' "

Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (citation omitted). Judge Constangy contends that the primary purpose of his prayer was to solemnify and dignify the atmosphere in court and to remind those in attendance of the court's search for truth and justice. Observing that Judge Constangy only recited the prayer in the morning session of court and not in the afternoon sessions, the district court found that the purpose of the prayer was not to solemnify the proceedings. The district court concluded that the prayer was religious in nature and did not serve a secular purpose.

Judge Constangy's position is supported by the following language in the Supreme Court's *Lynch v. Donnelly* decision:

> The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.

Lynch, 465 U.S., at 680 (citations omitted). Thus, it is not required that the primary purpose of the action be secular. However, "even though [state action] that is motivated in part by a religious purpose may satisfy the first criterion" of the *Lemon* test, the action must have "a clearly secular purpose." *Wallace v. Jaffree*, 472 U.S., at 56. Moreover, "it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S., at 586-587. Judge Constangy has stated that he composed his courtroom prayer after attending a conference for new judges, where there was a discussion about ways to open court and establish the proper decorum. During this discussion, another North Carolina district court judge mentioned that he opened court with prayer. Affidavits from other judges who attended the conference confirm Judge Constangy's account. Testimony at trial established that the bailiff recited the courtroom cry at both morning and afternoon sessions. The court heard different cases in the afternoon. Moreover, there was no evidence that the morning sessions were different from the afternoon sessions with regard to the atmosphere or level of noise in the courtroom. Nor was the atmosphere in Judge Constangy's courtroom different from that of other courtrooms. Based on these facts, the district court concluded that Judge Constangy's purpose was actually religious and not secular. While we recognize that the facts present a close question as to Judge Constangy's actual intent, we cannot say that the district court's finding is clearly erroneous.

Moreover, controlling caselaw suggests that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test. For example, the Supreme Court held in *Wallace v. Jaffree* that an Alabama statute authorizing a period of silence for "meditation or voluntary prayer" in public schools was intended to convey a message of state approval of prayer activities. In *Stone v. Graham*, 449 U.S. 39 (1980), the Supreme Court held that a posting of the Ten Commandments in the public schools violated the first prong of the *Lemon* test despite the legislature's requirement that each of the Ten Commandments be printed with the words: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 41 (citation omitted). The Supreme Court ruled:

> The preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.

Id. at 41 (footnote omitted). Similarly, the fact that prayer is "undeniably religious", *Hall v. Bradshaw*, 630 F.2d 1018, 1020 (4th Cir. 1980), lends less credence to Judge Constangy's stated secular purpose.

B.

Even assuming, *arguendo*, that Judge Constangy's actions survive the first prong of the *Lemon* test, we would still find that the prayer violates the Establishment Clause because it fails the second and third prongs of *Lemon v. Kurtzman. See Edwards v. Aguillard,* 482 U.S., at 583 (a practice violates the Establishment Clause if it fails any of the three *Lemon* tests).

The second question under *Lemon* is whether the primary effect of the practice is to advance or inhibit religion. "The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree,* 472 U.S., at 56 n.42 (quoting *Lynch v. Donnelly,* 465 U.S., at 590 (O'Connor, J., concurring)). Thus, under the second prong of *Lemon,* Judge Constangy's intent is irrelevant. Rather, we must focus on how his prayer was perceived.

When a judge sits on the bench, says "Let us pause for a moment of prayer," and proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion. "Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Wallace v. Jaffree,* 472 U.S., at 60 (footnote omitted). Judge Constangy argues that the prayer he delivers is his personal prayer and thus it does not result in government endorsement of religion. We find Judge Constangy's argument wholly unpersuasive.* A judge wearing a robe and speaking from the bench is obviously engaging in official conduct.

Judge Constangy also argues that his prayer is no more an endorsement of religion than the phrase, "In God We Trust," on coins or the announcement made when many courts are opened, "God save the United States and this Honorable Court." Appellant notes that in *Marsh v. Chambers*, the Supreme Court observed that its own session had opened with the announcement, "God save the United States and this Honorable Court." *Marsh*, 463 U.S., at 786. However, these brief references to God have been repeated so often that their religious meaning has diminished so that they are merely examples of "ceremonial deism." *Allegheny*, 492 U.S., at 620 (O'Connor, J., concurring). The words, "In God We Trust," on coin and currency have been upheld as a "patriotic and ceremonial" motto with "no theological or ritualistic impact." *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). As we have stated before, "[r]eferences to the Deity in our ceremonies and on our coinage and seals do not violate the Establishment Clause because they merely reflect this fact of our history and no longer have any potentially entangling theological significance." *Hall v. Bradshaw*, 630 F.2d, at 1023 (footnote omitted). In contrast, prayer in the courtroom by a judge is a religious act by a government official with little historical support. It cannot be considered mere "ceremonial deism". The testimony at trial showed that persons who have heard Judge Constangy's prayer in court felt that the judge wanted those present to pray with him and felt that the judge was endorsing religion. We agree with the district court's finding that the primary effect of Judge Constangy's prayer was to advance and endorse religion.

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* Of course, Judge Contangy is free to recite a personal prayer in the privacy of his home or chambers before he goes on the bench.

C.

The third prong of the *Lemon* test asks whether the challenged practice results in excessive entanglement of the government with religion. It is the view of this court that when a judge prays in court, there is necessarily an excessive entanglement of the court with religion. "[T]he government must pursue a course of complete neutrality toward religion." *Wallace v. Jaffree*, 472 U.S., at 60 (footnote omitted). This principle applies with even greater force to the judicial branch because judges are sworn to be neutral arbiters and must apply the law even-handedly without letting bias or personal feeling enter into the decision. For the judge to start each day with a prayer is to inject religion into the judicial process and destroy the appearance of neutrality. In particular, the prayer that Judge Constangy recited gave the appearance of seeking divine intervention in the courtroom proceedings. We have recently held in *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991), that it is impermissible for a judge's personal religious views to enter into a sentencing procedure. In that decision, we explained:

> Our Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office. Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing.

Id. at 740. While the case before us concerns the Establishment Clause and does not involve the issue of actual prejudice to a party due to a judge's religious views, the *Bakker* decision is nevertheless instructive as it reflects the dangers of allowing a judge's religious views to enter the courtroom.

Appellant argues that there is no excessive governmental entanglement with religion here because there is no expenditure of government funds toward religion. While the involvement of government funds is a factor to consider in deciding whether there is entanglement, *see Lynch v. Donnelly*, 465 U.S., at 684, we do not believe that expenditure of government funds is a requirement for finding a violation of the third prong of *Lemon*. "Entanglement is a question of kind and degree." *Id.* In deciding questions of entanglement, the Supreme Court has been particularly concerned about "ongoing, day-to-day interaction between church and state." *Id.* The instant case does not apparently present a problem of government involvement with the affairs of a particular religious organization. However, Judge Constangy's daily deliverance in court of a prayer that he himself composed certainly results in an ongoing, day-to-day merging of judicial and religious functions.

Another kind of entanglement may result when the challenged practice leads to diviseness along religious lines. *Lemon v. Kurtzman*, 403 U.S., at 622. "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* (citation omitted). We have stated before that "[b]y placing its imprimatur on the particular kind of belief embodied in any prayer, the state necessarily offends the sensibilities not only of nonbelievers, but of devout believers among the citizenry who regard prayer 'as a necessarily private experience.'" *Hall v. Bradshaw*, 630 F.2d, at 1021 (quoting *Abington School District v. Schempp*, 374 U.S. 203, 283-85 (1963) (Brennan, J., concurring)). The in-court recitation by the judge of a prayer written by the judge puts the court's approval on a particular kind of belief. As evidenced by the record, many people who have come before Judge Constangy are offended by his prayer, either because they do not share his beliefs or because they prefer to pray in private and feel uncomfortable with public prayer. We are persuaded on the final element of *Lemon* that Judge Constangy's prayer has the potential for entangling the state in divisiveness along religious lines.

Thus, as explained above, Judge Constangy's practice of praying in court fails the third prong of *Lemon* by excessively entangling the government with religion.

IV.

We conclude that the courtroom prayer at issue in this case violates the Establishment Clause of the United States Constitution. Although the barrier between church and state erected by the Clause is "blurred, indistinct, and variable," *Lynch v. Donnelly*, 465 U.S., at 679 (quoting *Lemon*, 403 U.S., at 614), the practice at issue in this case is clearly unconstitutional under all the tests and criteria developed by the Supreme Court in the Establishment Clause area. Judge Constangy's prayer in the courtroom violates the tests set forth in *Lemon* and results in governmental endorsement of religion. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-89-438-M

NORTH CAROLINA CIVIL LIBERTIES UNION, *et al.*,
Plaintiffs,

-vs-

HONORABLE H. WILLIAM CONSTANGY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Oct. 18, 1990]

FACTS

The undisputed facts of this case are as follows:

The defendant, the Honorable H. William Constangy, has been duly appointed Judge of the District Court of the Twenty-Sixth Judicial District of North Carolina since March 3, 1989. His salary is paid by the State of North Carolina.

Judge Constangy holds court regularly during approximately 45 weeks per year. Since May of 1989, his court has been opened in the morning by the bailiff with the cry, "Everyone rise; this Court is now in session, Honorable William Constangy, Judge, presiding. Please be seated."

After the bailiff's opening cry, Judge Constangy has regularly seated himself behind the bench, turned on the light at the bench, and stated, "Let us pause for a moment of prayer." He has then recited the following prayer aloud:

> O Lord, our God, our Father in Heaven, we pray this morning that you will place your divine guiding hand on this courtroom and that with your mighty outstretched arm you will protect the innocent, give justice to those who have been harmed and mercy to us all. Let truth be heard and wisdom be reflected in the light of your presence here with us today. Amen.

This prayer is a part of the opening of court. It takes Judge Constangy about 30 seconds to deliver it. Judge Constangy always says the same prayer, with the same introduction, each morning at the opening of court, whether civil or criminal, except when he presides over civil commitment hearings, which are conducted in the mental health clinic.

The bailiff re-opens court in the afternoon with his customary cry. Judge Constangy does not recite his prayer when court is re-opened in the afternoon.

Since becoming a judge, Judge Constangy has presided most frequently over misdemeanor criminal cases. Defendants in custody are not brought into the courtroom until after the prayer has been completed. Judge Constangy has never held juvenile court.

The prayer was composed by Judge Constangy. He did not consult any prayer books or other religious writings in drafting it, nor did he consult members of the clergy or other individuals or religious institutions.

Plaintiff North Carolina Civil Liberties Union is a non-profit North Carolina corporation which holds itself out as being devoted to securing and defending the rights, privileges and immunities guaranteed by the United States Constitution and the Constitution of North Carolina, and as having a special interest in the rights protected by the First Amendment. A number of its members live in Charlotte and may be subject to being ordered to attend Judge Constangy's courtroom as witnesses or defendants in the same manner as any other citizens or group of citizens.

The individual plaintiffs are attorneys licensed to practice in Judge Constangy's court. Each individual plaintiff has been present for at least one recitation of Judge Constangy's court-opening prayer.

Immediately before saying his prayer, Judge Constangy always says, "Let us pause for a moment of prayer." No other verbal or written announcement is made that the court will be opened with a prayer. Judge Constangy would be willing to announce that he will say a prayer and to allow anyone in the courtroom who wishes to leave the room an opportunity to do so.

Judge Constangy intends to continue indefinitely his practice of opening each session of court with a prayer.

CONCLUSIONS OF LAW

The "Establishment Clause" of the United States Consttiution, First Amendment, Section 1, adopted in 1791, says:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Supreme Court long ago, in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), held that the Establishment Clause (though it is phrased as a restriction on "Congress") also restricts action by *state* governments and the servants, agents and agencies, of *state* governments.

That includes judges.

State and federal.

Judge Constangy, as a state judge, is required by the United States Constitution to "make no law" "respecting an establishment of religion."

The Supreme Court first confronted official prayer in *Engel v. Vitale*, 370 U.S. 421 (1962). In that case, the Court held that the practice of beginning classes in the New York public schools with a short, non-denominational prayer was unconstitutional. The Court found irrelevant to Establishment Clause analysis the facts that the prayer was non-denominational and that students were free to remain silent or to leave the room during its recitation.

Perhaps the most important of the Supreme Court's Establishment Clause decisions is *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In that case, the Court formulated a three-part test that has been applied, almost without exception,[1] to subsequent Establishment Clause cases brought before the Court:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' "

403 U.S. at 612-13 (citations omitted).

A practice that fails any part of this three-part test is unconstitutional. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

Judge Constangy's prayer fails all three parts of the test.

Judge Constangy states that his prayer has the secular purposes of providing a solemn and dignified atmosphere and of reminding those in attendance of the court's search for truth and justice. However, Judge Constangy recites his prayer only in the morning when he opens court, and not when he re-opens court in the afternoon. This practice demonstrates that the solemnity and dignity of the courtroom are not dependent upon the recitation of an opening prayer.

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[1] One notable exception is *Marsh v. Chambers*, 463 U.S. 783 (1983), discussed *infra*.

Prayer, whether public or private, is a religious act. The evidence shows that the purpose of Judge Constangy's prayer is religious, rather than secular.

Judge Constangy's prayer also "advances" religion. When he recites the prayer, Judge Constangy presides over his courtroom, literally robed in the authority of the State. Such an official endorsement of religion violates the second prong of the *Lemon* test.

Finally, Judge Constangy's prayer is an "excessive government entanglement with religion." As the Court explained in *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982), "the core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.'" When Judge Constangy recites his prayer, those functions are impermissibly fused.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court upheld the Nebraska State Legislature's practice of having a chaplain, paid by the State, recite a prayer at the beginning of each legislative session. Central to its holding was the Court's finding that:

> "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."
>
> *Id.* at 788.

The Court held that, "[i]n light of the unambiguous and unbroken history of more than 200 years," *id.* at 792, the *legislature's* opening prayer did not violate the Establishment Clause.

There is no evidence in this case of any such 200 year-old "unambiguous and unbroken history." The ceremonial practice of opening *courts* with the phrase, "God save the United States and this honorable court," like the motto "In God We Trust" on coins, is not comparable to Judge Constangy's prayer. Such perfunctory acknowledgements of religion have been referred to as aspects of a "ceremonial deism," and "have lost through rote repetition any significant religious content." *See Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting); *see also id.* at 693 (O'Connor, J., concurring).

Presumably because of the overwhelming historical evidence presented in *Marsh v. Chambers*, the *Marsh* Court did not apply the *Lemon* test. Because there is no comparable evidence in this case, the *Lemon* test applies. As is demonstrated *supra*, Judge Constangy's prayer cannot pass the *Lemon* test.

Judge Constangy's prayer, uttered in good faith to an audience that may include people of different faiths (or no admitted faith at all) is an obvious violation of the First Amendment.

It tends to promote the *"establishment"* of religion, which wise men two centuries ago said that government should not do.

If the practice is approved over objection as a routine courtroom procedure, it will inescapably lead us into competition (probably violent if history is a guide) among conscientious persons over the choice of people to pray, the form of the prayer, and the Deity to whom the prayer is addressed.

These are fair questions for full and open debate among persons of all faiths.

They are not, in our land since the First Amendment, questions that the *government*, state or federal, should lay hands on.

When a judge prays aloud in his courtroom, to an audience which is overwhelmingly captive, he promotes the "establishment of religion." He also skews the search for truth, and truth should be the prime, day-to-day aim of all judges and jurors, be they federal or state.

I, myself, lay claim to a religious faith and practice. It is Scotch Presbyterian by label and, like Judge Constangy's, is Christian in origin and tradition. It is a faith in God Almighty as Father of us all and as Mentor and Protector and Law Giver of us all, regardless of our race, color or creed. It fosters a belief that people serve God by fair and generous dealings in everyday life with all people among whom we live.

As a *faith* (apart from church structure and organization), it probably does not differ in any material way from Judge Constangy's Catholic faith.

But it does not depend upon nor call upon the authority of local government, or its agents, for its protection and survival.

That protection and survival are afforded by the First Amendment to the Constitution of the United States.

With all due respect for Judge Constangy's sincerity, I must conclude that his prayer in the courtroom is contrary to the law of the land.

Plaintiffs will prepare an appropriate order.

This 18 day of October, 1990.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-89-438-M

NORTH CAROLINA CIVIL LIBERTIES UNION, *et al.*,
Plaintiffs,

-vs-

HONORABLE H. WILLIAM CONSTANGY,
Defendant.

ORDER

[Filed Nov. 15, 1990]

On October 18, 1990, the court entered its findings of fact and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

1. That defendant's practice of opening court with prayer violates the First and Fourteenth Amendments to the United States Constitution;

2. That defendant cease opening court with prayer; and

3. That plaintiffs recover their costs, counsel fees and expenses, to be separately determined.

This 13 day of November, 1990.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-89-438-M

NORTH CAROLINA CIVIL LIBERTIES UNION, *et al.*,
Plaintiffs,

-vs-

HONORABLE H. WILLIAM CONSTANGY,
Defendant.

JUDGMENT

[Filed Jan. 29, 1991]

On October 18, 1990, the court entered its findings of fact and conclusions of law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

1. That defendant's practice of opening court with prayer violates the First and Fourteenth Amendments to the United States Constitution;

2. That defendant cease opening court with prayer; and

3. That plaintiffs recover their costs, counsel fees and expenses, to be separately determined.

This 29 day of January, 1991.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division

C-C-89-438-M

THE NORTH CAROLINA CIVIL LIBERTIES UNION,
PHILIP F. HOWERTON, JR., KATHLEEN M. ARUNDELL,
SHARON SAMEK, RONALD EVERHART, and
JAMES GRONQUIST,
Plaintiffs,

vs.

THE HONORABLE H. WILLIAM CONSTANGY,
Defendant.

COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

[Filed Nov. 21, 1989]

Plaintiffs, complaining of Defendant and moving for a Preliminary Injunction, say:

1. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. 1343 and the doctrine of pendent jurisdiction.

2. This is an action pursuant to 42 U.S.C. 1983, to redress Defendant's deprivation, under color of state law, of rights, privileges and immunities secured to Plaintiffs by the First and Fourteenth Amendments to the United States Constitution. This is also an action to redress Defendant's infringement of Plaintiffs' liberties guaranteed by Art. I, Sec. 13 of the North Carolina Constitution.

3. Defendant is a duly appointed and presently empowered Judge of the District Court of the Twenty Sixth Judicial District of North Carolina. This District is coterminous with Mecklenburg County, North Carolina.

4. Defendant's court is regularly opened by the bailiff in the usual fashion. Defendant then regularly says "Let us pray." Defendant then delivers this prayer:

> O Lord, our God, our Father in Heaven, we pray this morning that you will place your divine guiding hand on this courtroom and that with your mighty outstretched arm you will protect the innocent, give justice to those who have been harmed and mercy to us all. Let truth be heard and wisdom be reflected in the light of your presence here with us today. Amen.

5. Plaintiff North Carolina Civil Liberties Union is a non-profit North Carolina corporation devoted to securing and defending the rights, privileges, and immunities guaranteed by the United States Constitution and the Constitution of North Carolina. This Plaintiff has a special interest in the rights protected by the First Amendment. A number of its members reside in Charlotte, and are subject to attending Judge Constangy's courtroom and being forced to listen to his prayer. These members are or would be offended by his unconstitutional prayer and must, therefore, assume special burdens to avoid his unconstitutional conduct.

6. The individual Plaintiffs are attorneys licensed to practice in Defendant's court. Each Plaintiff has been present upon one or more occasions of Defendant's court-opening prayer.

7. All Plaintiffs object to Defendant's practice of opening court with prayer, and believe that this practice violates the First and Fourteenth Amendments to the United States Constitution. All Plaintiffs are taxpayers in Mecklenburg County, North Carolina and the State of

North Carolina. All Plaintiffs are of the opinion that Defendant's practice of opening his court with prayer is his attempt as a Judge to symbolize government approval and endorsement of religion. Each Plaintiff is offended by Defendant's practice of opening court with prayer. All Plaintiffs believe that their liberty to practice their profession is infringed by Defendant's practice of opening court with prayer.

8. Plaintiff Howerton has silently objected to Defendant's court-opening prayer when subjected to it, and on other occasions has gone out of his way and altered what he otherwise would do so as to not be present during Defendant's court-opening prayer.

9. Plaintiff Arundell has on occasion bowed her head without wishing to do so during Defendant's court-opening prayer, but more frequently has left the courtroom, or deferred doing what she otherwise would be doing, on account of Defendant's court-opening prayer. She has on occasion gone out of her way to avoid being present for Defendant's court-opening prayer.

10. Plaintiff Samek has on occasion left Defendant's courtroom, and on occasion gone out of her way to avoid being present in Defendant's courtroom, because of Defendant's court-opening prayer.

11. Plaintiff Everhart has on occasion bowed his head without wishing to do so, but more frequently has left the courtroom, or deferred doing what he otherwise would be doing, on account of Defendant's court-opening prayer. He has on occasion gone out of his way to avoid being present for Defendant's court-opening prayer.

12. Plaintiff Gronquist has on occasion gone out of his way to avoid being present for Defendant's court-opening prayer.

13. Defendant's court-opening prayer violates the First and Fourteenth Amendments to the United States Con-

stitution, and Art. I, Sec. 13 of the North Carolina Constitution.

14. Plaintiffs have no plain, adequate or complete remedy at law to redress Defendant's unconstitutional action, and have suffered and will continue to suffer great, immediate and irreparable harm until Defendant is enjoined as requested.

WHEREFORE, Plaintiffs respectfully "pray":

1. That the Court advance this matter upon the docket and, after an evidentiary hearing, enjoin Defendant to cease publicly praying in his Courtroom, *pendente lite*;

2. That at final trial the Court declare that Defendant's publicly praying in his courtroom is unconstitutional, and permanently enjoin its continuance; and

3. That Plaintiffs recover their costs, their reasonable counsel fees, and such other and further relief as is merited in the premises.

Respectfully submitted, this 21 day of November, 1989.

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APPENDIX F

DEFENDANT'S EXHIBIT 22

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division

C-C-89-438-M

THE NORTH CAROLINA CIVIL LIBERTIES UNION,
PHILIP F. HOWERTON, JR., KATHLEEN M. ARUNDELL,
SHARON SAMEK, RONALD EVERHART, and
JAMES GRONQUIST,
Plaintiffs,

vs.

THE HONORABLE H. WILLIAM CONSTANGY,
Defendant

STIPULATIONS

[Filed May 14, 1990]

1. Since March 3, 1989, Defendant Judge Constangy (hereinafter "Judge Constangy") has been a duly appointed and empowered Judge of the District Court of the Twenty-Sixth Judicial District of North Carolina. His salary has been paid by the State of North Carolina.

2. Judge Constangy holds court regularly during approximately 45 weeks per year. Since May, 1989, his court has been opened in the morning by the bailiff with the cry, "Everyone rise, this Court is now in session, Honorable William Constangy, Judge Presiding, please be seated." Defendant has then regularly seated himself behind the bench, turned on the light at the bench, and

stated, "Let us pause for a moment of prayer." He has then said the following:

> O Lord, our God, our Father in Heaven, we pray this morning that you will place your divine guiding hand on this courtroom and that with your mighty outstretched arm you will protect the innocent, give justice to those who have been harmed and mercy to us all. Let truth be heard and wisdom be reflected in the light of your presence here with us today. Amen.

This prayer is a part of the opening of court. It takes Judge Constangy about 30 seconds to deliver it. Judge Constangy always says the same prayer, with the same introduction, each morning at the opening of court, whether civil or criminal, except when he presides over civil commitment hearings, which are conducted in the mental health clinic. Judge Constangy has never held juvenile court.

3. The prayer was composed by Judge Constangy. He did not copy it from or consult any prayerbooks or other religious writings in drafting it. He did not consult any religious organizations or any ministers, rabbis, priests or other representatives of any churches, temples, or religious organizations in drafting it. He did not consult anyone about the wording of the prayer or seek comment about its language before or while drafting it.

4. In the afternoons, Judge Constangy's court has been opened by the bailiff in the usual fashion. Judge Constangy has then commenced to hear the matters presented, without then or later during this session delivering any prayer. On occasion cases are carried over from a morning to an afternoon session.

5. Plaintiff North Carolina Civil Liberties Union is a non-profit North Carolina corporation which holds itself out as being devoted to securing and defending the rights, privileges, and immunities guaranteed by the United

States Constitution and the Constitution of North Carolina, and as having a special interest in the rights protected by the First Amendment. A number of its members reside in Charlotte and may be subject to being ordered to attend Judge Constangy's courtroom as witnesses or defendants in the same manner as any other citizens or group of citizens. No showing has been made that members of the North Carolina Civil Liberties Union are particularly subject to being summoned to appear as witnesses or defendants in court generally or in Judge Constangy's court specifically.

6. Judge Constangy has, since becoming a judge, held court in Courtroom No. 203 of the Mecklenburg County Courthouse more frequently than in any other courtroom. Plaintiffs' Exhibit A is a diagram of that courtroom. In this courtroom he has heard almost entirely misdemeanor criminal cases. Judge Constangy frequently has more than 100 cases set before him at a session.

7. In March, 1990, the new Mecklenburg County Criminal Courts Building was opened. Although Judge Constangy is moving around between courtrooms more than he was earlier, he is now holding court most often in Courtroom 2203 of the new building where he hears misdemeanor criminal cases.

8. Judge Constangy intends to continue indefinitely his practice of opening court each morning with prayer.

9. Immediately before saying his prayer, Judge Constangy always say, "Let us pause for a moment of prayer." No other verbal or written announcement that Judge Constangy's court will be opened with prayer is made. Judge Constangy would be willing to make an announcement that he will say a prayer and allow anyone in the courtroom who wishes to leave an opportunity to do so.

10. Defendants in custody are not brought into the courtroom until after the prayer has been completed.

11. Judge Constangy has used his power to sanction for direct contempt only once during his tenure. On that occasion a defendant slugged a prosecuting witness in open court.

12. Judge Constangy believes that courts exist to dispense justice and courts should be conducted in a dignified atmosphere.

13. The time preceding and following the opening of criminal sessions of District Court is often utilized by attorneys to discuss cases with the assistant district attorney and with police officers who are adverse witnesses, and to determine at calendar call (done by the assistant district attorney before the opening of court) which of one's clients are present.

14. The North Carolina Trial Judges' Bench Book, Second Edition, Superior Court Division, the North Carolina Trial Judges' Bench Book, District Court Division, and the North Carolina Clerk of Court Procedures Manual all set out the appropriate calls for the bailiffs' opening of court, closing of court, reopening of court, and adjournment of court. All such calls include the phrase "God save the state and this honorable court."

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FEB 24 1992
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No. 91-1176

In The

Supreme Court of the United States

October Term, 1991

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THE HONORABLE H. WILLIAM CONSTANGY,

Petitioner,

v.

NORTH CAROLINA CIVIL LIBERTIES UNION, et al.,

Respondents.

◆

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

◆

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1. Whether the issue of standing is properly presented in this court, since petitioner (a) failed to raise the issue in a timely manner, and (b) acquiesced in the uncontested assumption of standing by both courts below.

2. Whether respondents have shown the personal injury required for standing.

3. Whether in ruling that Judge Constangy's court-opening prayer violates the Establishment Clause, the court of appeals followed the applicable decisions of this Court.

4. Whether this Court should deny review because Judge Constangy's court-opening prayer fails any conceivable Establishment Clause test.

PARTIES

The North Carolina Civil Liberties Union is a party in this court and was a Plaintiff-Appellee below. The North Carolina Civil Liberties Union Legal Foundation was mistakenly denominated a party in the caption of the circuit court opinion. Appendix to Petition for Certiorari, at 1a. The circuit court has been requested to correct this clerical error.

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No. 91-1176

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In The

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THE HONORABLE H. WILLIAM CONSTANGY,

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v.

NORTH CAROLINA CIVIL LIBERTIES UNION, et al.,

Respondents.

◆

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

◆

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

◆

STATEMENT OF THE CASE

Judge Constangy's Answer pleaded that respondents "have failed to allege a case or controversy." J.A. 14.[1] Lack of standing was not thereafter asserted by Judge Constangy, by pleading or argument, until next asserted in the Petition for Certiorari. Respondents' Pre-Trial Brief expressly argued that respondents had standing. Docket No. 15. Judge Constangy's Brief in Opposition in the district court made no mention of standing. Docket No.

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[1] "J.A." refers to the Joint Appendix on appeal.

26. In his Opening Statement, respondents' counsel stated:

> The two principal arguments which are presented are, first, whether the Plaintiffs [respondents] have standing, that is, whether they are appropriate persons to bring the case, and that matter will be entirely presented on written testimony, and I do not think it is controverted.

Tr. 6.[2] Judge Constangy's attorney made no mention of standing in his Opening Statement. Tr. 8-10. Eight days before trial respondents had served Partial Direct Testimony of each respondent. J.A. 91-108. This testimony was obviously directed at standing. At trial this testimony was admitted without objection. At each of the five separate offers, respondents' counsel characterized the testimony as having to do principally with standing. Tr. 11, 68-69, 76, 85. There was no impeachment or contradiction of this testimony. Standing was not mentioned in closing arguments. Judge Constangy's Opening Brief in the court of appeals raised no issue of standing. Respondent's Brief stated:

> Judge Constangy does not dispute that Plaintiffs have standing. Plaintiffs briefed the issue of standing in the district court, Dkt. No. 15, and Judge Constangy made no response.

Judge Constangy's Reply Brief took no issue with this representation.

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[2] "Tr." refers to the trial transcript.

STATEMENT OF FACTS

1. Facts as to Standing

Judge Constangy's Statement of Facts enlarges upon the findings of the courts below with numerous assertions of fact culled from the testimony and exhibits. Petition for Writ of Certiorari, at 3-5. Most of these culls relate to the issue of standing. Judge Constangy has asserted that business was conducted very casually in his courtroom, *id.*, and that he took no notice of the behavior of others during his prayer, *id.*, at 4-5. Judge Constangy later uses these assertions to argue that respondents therefore absent themselves gratuitously when he prays, and are mere "offended observers" who suffer no injury in fact. Petition, at 11.

There is substantial uncontradicted testimony that bears on the issue of standing, and it shows that respondents are injured in fact. Respondent Arundell testified without impeachment or contradiction that after hearing Judge Constangy's prayer for the first time, she thereafter sought to leave the courtroom whenever he entered to start a morning session. Unless she could exit before he entered, she remained, because she felt intimidated about walking out once he had entered. Shortly after he started opening court with prayer she told him, outside court, that she did not think it was appropriate. He said, "[T]hank you for letting me know." Respondents Samek and Everhart testified to the same effect. J.A. 93, 101-02. Respondents Howerton and Gronquist testified that they had on one occasion been present for the prayer, and on one or more occasions particularly avoided appearing until the prayer was finished. Respondents Samek, Arundell and Everhart testified, without impeachment or contradiction:

> The time preceding and following the opening of court is often utilized by attorneys to discuss cases with the Assistant District Attorney and with police officers who are adverse witnesses, and to determine at calendar call (usually done by the Assistant District Attorney) which of one's clients are present. To the extent that I have been absent for periods of time before, during and after Judge Constangy's prayer, on account of his prayer, his prayer has interfered with my opportunity to handle my cases at that time. There is usually a line of attorneys waiting to talk to the Assistant District Attorney, and on occasion I have lost my place in line on account of leaving the courtroom to avoid being present for Judge Constangy's prayer. This has on occasion resulted in a delay in the handling of my cases.

J.A. 98, 102, 106. Each of these respondents was assigned by the Public Defender to attend Judge Constangy's court. J.A. 98, 101, 105.

Litigants in Judge Constangy's courtroom, many of whom are present under compulsion of legal process, have no realistic opportunity to escape hearing his prayer. No announcement is made that he will open court with prayer. His usual courtroom, which is typical of district courtrooms, has a center aisle, and the benches on either side seat 7 or 8 people. The courtroom is often full (150 people) at the beginning of a session. His prayer lasts 30 to 40 seconds. A person seated near the wall in the middle of the courtroom could hardly exit before the prayer was finished, especially since most persons present bow their heads. If she did exit in time, she would then have no way of knowing when the prayer concluded, short of defeating her objective by listening to it at the door. If her case were called immediately after the prayer, she would be passed over and would then wait an hour or more until her case was recalled. If Judge Constangy were holding jury court, the objecting lawyer or litigant would have to make an unexplained and embarrassing exit and re-entry to avoid hearing the prayer. J.A. 62-64, 89, 112-21.

2. Facts as to Religious Purpose, Effect and Entanglement

Judge Constangy has asserted that his secular purpose in opening court with prayer was to "set the proper tone" so that there would be no "tricks and games" by the lawyers. Petition, p. 5. The district court expressly rejected this assertion and found to the contrary. Appendix to Petition, at 20a-21a. The circuit court expressly affirmed this finding. *Id.*, at 10a-11a. At his deposition Judge Constangy refused, until he was compelled by the district court, to answer whether he had a religious purpose in delivering his prayer. J.A. 129-31. He then denied having any religious purpose because he interpreted religious purpose to mean only having a purpose to proselytize. J.A. 132. He did then admit that religion could also appropriately be defined as "a person's relationship with God," but he continued to maintain that his prayer was not religious even if this definition were applied. J.A. 133-34. Finally, he agreed that one of his purposes in delivering his prayer was "to express a reverence for God," but he still denied that this was a religious purpose. J.A. 135. He repeated this position at trial. J.A. 43-45. He was then presented with the prayer from *Engel v. Vitale,* 370 U.S. 421 (1962), and told that the Supreme Court had characterized this prayer as a religious activity. He persisted in testifying that his prayer, though not theologically distinguishable, was not religious. J.A. 44, line 19 through J.A. 50, line 25. This disingenuous testimony informed the district court's finding of fact that Judge Constangy had a religious purpose in delivering his prayer.

Judge Constangy admitted that numerous other courts establish a proper tone and atmosphere without being opened with prayer. J.A. 34-35. The circuit court found that the atmosphere in Judge Constangy's court was not different from that of other courtrooms. Appendix to Petition, at 11a. Judge Constangy does not open afternoon court with prayer, even though there is a completely new docket in the afternoon and in his view the normal court-opening invocation is not sufficient to create the proper tone and atmosphere. J.A. 113, 128-29.

Judge Constangy admitted that a Judge held a symbolic position and that when he prayed in court he did so as a governmental official. J.A. 155, 158. The individual respondents testified to serious religious objections to the prayer. Respondent Samek, a Jewish person, felt that the prayer sought to proselytize her away from her faith. Tr. 18. Respondent Arundell, a Christian, testified that she felt that public displays of religiosity were demeaning to her religious beliefs. Tr. 77. Respondent Everhart testified that the prayer promoted a concept of a patriarchal God not shared by atheists, agnostics, and many world religions. He also objected to Judge Constangy calling on his God to intervene into respondent Everhart's personal life. J.A. 77-79.

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REASONS FOR DENYING THE WRIT

Judge Constangy has improperly raised the issue of standing in this court, not having asserted it since filing Answer. He should be estopped from raising it now. If properly raised, it is meritless. Respondents, Assistant Public Defenders in Judge Constangy's court, are injured in fact by Judge Constangy's prayer. They have absented themselves from court during the prayer because of religious objections to it, and they thereby lost their position in line to discuss their cases with the Assistant District Attorney. The organizational respondent is injured in fact because its members are subject to being compelled to attend Judge Constangy's prayer.

The court of appeals applied well-established doctrine in concluding that Judge Constangy's prayer violated each of the three tests of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Petition should be denied even if the court contemplates reformulation of *Lemon*, because this case was correctly decided even under the proposed reformulations of *Lemon*. Judge Constangy's court-opening prayer is an endorsement of religion, and so offends Justice O'Connor's proposed reformulation in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (O'Connor, J., concurring). It is coercive, there being no realistic opportunity to escape it, and so offends Justice Kennedy's proposed reformulation in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part).

This case also presents no conflict with *Marsh v. Chambers,* 463 U.S. 783 (1983). There is only sparse and anecdotal history of opening courts with prayer. Opening court with prayer by a judge contaminates the neutrality of the court. A legislature is perceived as partisan, not neutral, so opening a legislature with prayer by a chaplain does not so strikingly identify it with religion.

I. THE ISSUE OF STANDING IS NOT PROPERLY PRESENTED IN THIS COURT BECAUSE JUDGE CONSTANGY (A) FAILED TO RAISE THE ISSUE IN A TIMELY MANNER AND (B) ACQUIESCED IN THE UNCONTESTED ASSUMPTION OF STANDING BY BOTH COURTS BELOW.

Standing is an aspect of justiciability and cannot be waived. *Valley Forge College v. Americans United,* 454 U.S. 464, 476 (1982). Standing may be raised for the first time in this court, *see, e.g., Princeton University v. Schmid,* 455 U.S. 100, 103 (1982), although typically that occurs in cases arising from the state courts, *id.; Doremus v. Board of Education,* 342 U.S. 429 (1952); and of course in original jurisdiction cases, *Wyoming v. Oklahoma,* ___ U.S. ___, 60 U.S.L.W. 4119 (U.S., January 22, 1992). In cases arising from federal courts a party may lose his right to challenge findings or assumptions of standing made by the courts below "when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Steagald v.*

United States, 451 U.S. 204, 209 (1981) (lack of expectation of privacy not raised in Fourth Amendment case).

Respondents repeatedly asserted standing. Judge Constangy never asserted lack of standing in either court below, except perfunctorily in his Answer. Judge Constangy has secretly laid in wait, ever since filing his answer, and now seeks to ambush respondent. He should be estopped to do so. *Id.*

II. RESPONDENTS HAVE SHOWN THE PERSONAL INJURY REQUIRED FOR STANDING

Judge Constangy now having emerged from ambush, it appears that his gun is not loaded. Judge Constangy asserts that respondents are merely "offended observers" who do not suffer the injury in fact required for standing. Judge Constangy conveniently omits numerous pertinent facts bearing on the issue: that respondents are assigned to Judge Constangy's courtroom; that they are forced to leave a place that they have a right to be or delay going there because of his prayer; and that they lose their place in line to talk to the Assistant District Attorney on this account. That is injury in fact, traceable to Judge Constangy's conduct, redressable by injunction. *Valley Forge College v. Americans United,* 454 U.S. 464, 472 (1982).

The individual respondents have felt intimidated or offended by Judge Constangy's prayer. Members of the audience, including members of the respondent organization or other objectors, are essentially held captive for the duration of this prayer because there is no effective opportunity to exit nor realistic way to know when to return if one does manage to exit.

Court opens with a command to rise. Very shortly there follows a command to be seated. Judge Constangy then immediately says: "Let us pause for a moment of prayer." In context his words are coercive. One is judicially ordered to pause and observe his prayer. Respondents are compelled participants in his prayer.

The facts of this case are well within the ambit of numerous recent comparable cases in which this court has found standing without discussion of the issue. *See, e.g., Abington School District v. Schempp,* 374 U.S. 203 (1963); *Stone v. Graham,* 449 U.S. 39 (1980); *Lynch v. Donnelly,* 465 U.S. 668 (1984); *Wallace v. Jaffree,* 472 U.S. 38 (1985); *Edwards v. Aguillard,* 482 U.S. 578 (1987); *Allegheny County v. American Civil Liberties Union,* 492 U.S. 573 (1989). The present case is closest to, but even stronger than, *Abington.* There parents were given the option to have their children excused from religious exercises. Here children are subject to being compelled to attend Judge Constangy's court as witnesses, but given no realistic opportunity to leave.

III. IN RULING THAT JUDGE CONSTANGY'S COURT-OPENING PRAYER VIOLATES THE ESTABLISHMENT CLAUSE, THE COURT OF APPEALS FOLLOWED THE APPLICABLE DECISIONS OF THIS COURT.

In holding unconstitutional Judge Constangy's practice of opening the morning, but not the afternoon, sessions of his court with prayer, the court of appeals faithfully followed the line of decisions of this Court from *Engel v. Vitale,* 370 U.S. 421 (1962), through *County of*

Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989). The court of appeals held that Judge Constangy's courtroom prayer violates all three prongs of the Establishment Clause test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and correctly concluded that "the practice at issue in this case is clearly unconstitutional under all the tests and criteria developed by the Supreme Court in the Establishment Clause area." *North Carolina Civil Liberties Union v. Constangy,* 947 F.2d 1145, 1152-53 (1991).

A. The Court of Appeals Fairly and Faithfully Followed the Decision in *Lemon* as Interpreted by this Court.

The court of appeals fairly applied the test of *Lemon v. Kurtzman* in a manner consistent with the subsequent decisions of this Court. Judge Constangy's characterization of the circuit court's application of a "super-*Lemon*" test is mere hyperbole and demonstrably false.

A practice that fails any prong of the *Lemon* test is unconstitutional. *Edwards v. Aguillard,* 482 U.S. 578, 583 (1987). Judge Constangy's prayer fails all three prongs.

1. Judge Constangy's prayer fails the "secular purpose test" in fact and as a matter of law.

In ruling that Judge Constangy's prayer fails the "secular purpose test," the court of appeals upheld the district court's factual finding that the prayer was religious in nature and did not serve a secular purpose. 947 F.2d at 1150. The court below also noted that this Court's decisions suggest "that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test." *Id.*, citing *Wallace v. Jaffree*, 472 U.S. 38 (1985), and *Stone v. Graham*, 449 U.S. 39 (1980). As this Court did in *Wallace* and *Stone*, the court of appeals held that the religious practice served no secular purpose despite a purportedly secular purpose advanced by the official. 947 F.2d at 1150.

The evidence at trial soundly supports the court of appeals' determination that Judge Constangy's prayer serves no secular purpose. While Judge Constangy contends that his primary purpose was to "produce a calm, quiet, serious atmosphere in the courtroom for the day," his actions belie his words. As the district court found:

> [J]udge Constangy recites his prayer only in the morning when he opens court, and not when he re-opens court in the afternoon. This practice demonstrates that the solemnity and dignity of the courtroom are not dependent upon the recitation of an opening prayer.

751 F. Supp. 552, 554 (W.D.N.C. 1990). The court of appeals noted that even though Judge Constangy heard different cases in the afternoon, there was no evidence of a difference between the morning and afternoon sessions with regard to the atmosphere or the level of noise in the courtroom. "Nor was the atmosphere in Judge Constangy's courtroom different from that of other courtrooms." 947 F.2d at 1150. In light of these facts, no secular purpose can justify Judge Constangy's practice of opening morning but not afternoon court by reciting a prayer.

This Court has rejected similar claims of secular purpose in numerous Establishment Clause cases. For example, in *Wallace v. Jaffree,* the Court held that an Alabama statute authorizing a minute of silence for "meditation or voluntary prayer" in public schools lacked any secular purpose. 472 U.S. at 56. In making its determination, the Court properly considered the statute's legislative history and the testimony of an Alabama legislator.

In *Stone v. Graham,* the Court rejected as clearly erroneous the trial court's finding that Kentucky's statute requiring the posting of the Ten Commandments on schoolroom walls had a secular purpose. The Court stated: "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." 449 U.S. at 41.

Likewise, in *Edwards v. Aguillard,* the Court rejected Louisiana's assertion of the secular purpose of its law requiring that the public schools either not teach evolution or teach both evolution and "creation science." 482 U.S. at 593. Louisiana claimed that this law furthered the secular purpose of teaching both points of view on the subject. 482 U.S. at 586. Just as the Court concluded that the primary purpose of the Creationism Act was "to advance a particular religious belief," the court of appeals here concluded the primary purpose of Judge Constangy's prayer is to further his religious beliefs.

Judge Constangy's assertions of secular purpose are no more convincing than the fine print beneath the Ten

Commandments or Louisiana's disingenuous claim of academic freedom. The need for solemnity and dignity does not disappear after lunch.

The argument regarding secular purpose advanced in Judge Constangy's petition is disingenuous, if not misleading. The petition criticizes the district court and court of appeals for considering Judge Constangy's personal "subjective motivations" for opening court with prayer instead of the "objective purpose" of the prayer. Judge Constangy contends that his "otherwise unobjectionable practice" of courtroom prayer "does not become unconstitutional just because the actor happens to possess religious motivations." Petition, at 21. But Judge Constangy then abandons his focus on "objective purpose" and contends that his avowed secular purpose in opening court with prayer shields him from further scrutiny under the Establishment Clause. *Id.* at 22. Under any "objective" standard, prayer is a religious act, wholly lacking in secular purpose. An otherwise objectionable religious act, such as Judge Constangy's prayer, does not become constitutional just because the actor professes a lack of religious motivation.

In applying the secular purpose test, this Court distinguishes not between "objective" and "subjective," but rather asks " 'whether the government's *actual* purpose is to endorse or disapprove of religion.' " *Wallace v. Jaffree,* 472 U.S. at 56 (emphasis added and citation omitted). Thus, in Judge Constangy's language, the court of appeals' determination of no secular purpose was appropriately "objective" and "subjective." Recognizing that the "objective" purpose of prayer is "intrinsically religious," the court of appeals considered – and rejected – Judge Constangy's "subjective" contention that his avowed personal purpose in praying somehow negates this "objective" religious purpose.

Under the ruling of the court below, Judge Constangy is free to hold any religious beliefs he chooses and to exercise those beliefs at all times, including while in the courtroom. The ruling below simply prevents him, as a governmental official, from engaging in a public, ceremonial act with a religious purpose.

2. Judge Constangy's prayer has the effect of endorsing religion.

The court of appeals also correctly applied the second *Lemon* test in concluding that "the primary effect of Judge Constangy's prayer was to advance and endorse religion." 947 F.2d at 1151. In so concluding, the court asked "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Id.* (quoting *Wallace v. Jaffree,* 472 U.S. at 56 n.42 (quoting *Lynch v. Donnelly,* 465 U.S. 668, 690 (1984) (O'Connor, J., concurring))). Regardless of Judge Constangy's avowed purpose, his prayer unequivocally conveys a message of endorsement of religion.

Judge Constangy's petition mischaracterizes the ruling of the court of appeals and the findings of the district court on the issue of primary effect. Far from focusing solely on the atheistic cavils of a "sufficiently fastidious nonbeliever,"[3] the court of appeals and the district court

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[3] In light of his petition's strident denunciation of nonbelievers, one might question whether Judge Constangy

(Continued on following page)

carefully considered the effect of court-opening prayer on a reasonable person as well as on persons actually present in the courtroom and concluded that the prayer's primary effect was to endorse religion.

The court of appeals first considered the official nature and surroundings of Judge Constangy's prayer from the standpoint of the reasonable observer. "When a judge sits on the bench, says 'Let us pause for a moment of prayer,' and proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion." 947 F.2d at 1151. Judge Constangy is not merely accommodating religion, as do Sunday closing laws and military chaplains; he is affirmatively advancing it. When he prays to open court, Judge Constangy is the government itself affirmatively promoting religion. He is compelling others to worship in *his* religion.

Unlike the ceremonial deism of the phrase "In God We Trust" on coins or the announcement opening many courts, "God save the United States and this Honorable Court," the court below found that "prayer in the courtroom by a judge is a religious act with little historical support." 947 F.2d at 1151. Like the Supreme Court, the

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(Continued from previous page)

realizes that it is precisely the nonbeliever that the Establishment Clause exists to protect. The Court has held that the Establishment Clause means "no official preference even for religion over nonreligion." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S. Ct. 3086, 3107 (1989) (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, ___, 109 S. Ct. 890, 896 (1989)). It is "an established principle that the government must pursue a course of complete neutrality toward religion." *Wallace v. Jaffree*, 472 U.S. at 60.

court of appeals distinguished between the religious effect of prayer and deistic references that have lost their religious meaning. *Id. See County of Allegheny v. American Civil Liberties Union*, 492 U.S. at 602-03, 109 S. Ct. at 3106; *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (O'Connor, J., concurring). Such a distinction flows naturally from the principle that a government official "may not engage in a practice that has the effect of endorsing religious beliefs," as determined by a "reasonable observer." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. at ___, 109 S. Ct. at 3115.

Contrary to Judge Constangy's contention, neither the court of appeals nor the district court based its determination of primary religious effect exclusively on the plaintiffs' trial testimony. The court of appeals simply cited testimony that the witnesses "felt that the judge wanted those present to pray with him and felt that the judge was endorsing religion." 947 F.2d at 1151. Such testimony supports, but is not the basis for, the conclusion that the primary effect of Judge Constangy's prayer is to endorse religion.

3. Judge Constangy's courtroom prayer excessively entangles government and religion by destroying the appearance of judicial neutrality.

The court of appeals held that Judge Constangy's court-opening prayer violates the third *Lemon* test of "excessive entanglement" because the ineluctable effect of such a daily prayer "is to inject religion into the judicial process and destroy the appearance of neutrality." Excessive entanglement, the court reasoned, inevitably results from such "an ongoing, day-to-day merging of judicial and religious functions." 947 F.2d at 1152.

This holding fits squarely within the language and rationale of the "excessive entanglement" test as stated in *Lemon v. Kurtzman*: "the statute must not foster 'an excessive government entanglement *with religion*.' " 403 U.S. at 613 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)) (emphasis added). Judge Constangy flatly mistates this test when he argues that *Lemon* forbids excessive entanglement only between church and state, not between religion and state. This Court has never restricted the "excessive entanglement" test to relationships between the state and a church.

In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), the Court invalidated a Massachusetts statute that gave churches the right to veto applications for liquor licenses from businesses located within 500 feet of the church. The Court held that this statute excessively entangled the government with religion because it violated the core rationale underlying the Establishment Clause, which is "preventing a 'fusion of governmental and religious functions.' " *Id.* at 127 (quoting *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963)). Judge Constangy's practice of prayer fuses government and religion at the most visible point of the court system.

Relying on the specific language and holding of *Lemon*, the court of appeals also noted "that Judge Constangy's prayer has the potential for entangling the state in divisiveness along religious lines." 947 F.2d at 1152. In holding that prayer leading to such divisiveness may constitute another kind of entanglement, the court again quoted *Lemon*: "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect." 403 U.S. at 622 (citation omitted).

While this Court often has considered religious divisiveness in the context of direct governmental subsidies to religious institutions, *Lynch v. Donnelly*, 465 U.S. at 684, its holding in *Larkin v. Grendel's Den* demonstrates that it may consider religious divisiveness engendered by other forms of governmental action. Thus Judge Constangy errs when he contends that state-sponsored religious divisiveness is relevant to an "excessive entanglement" inquiry only when the state provides direct subsidies to churches. To the contrary, as this Court stated in *Lynch v. Donnelly*: "Entanglement is a question of kind and degree." 465 U.S. at 684. There is no reason why the court should not consider potential political and religious divisiveness as part of the kind and degree of the entanglement present here.

Under the rationale of *Lemon*, *Larkin* and *Lynch*, Judge Constangy's courtroom prayer results in an excessive entanglement of government with religion. By opening his morning court sessions with prayer, Judge Constangy forfeits the appearance of neutrality that is central to our judicial system and entangles the state's administration of justice with the judge's personal religious views. That entanglement violates the Establishment Clause.

The court of appeals fairly and faithfully applied the three prongs of the *Lemon* test in holding that Judge

Constangy's courtroom prayer violated the Establishment Clause. Nothing in the court of appeals' application of the *Lemon* test or its ruling in the instant case would constitutionally prohibit Thanksgiving proclamations, the government's accommodation of persons who wish to observe religious holidays, or any religious practices previously permitted by this Court. Rather, the lower court's opinion is restricted to the facts of a particular courtroom prayer. Just as this Court has applied the *Lemon* test to prohibit prayer in the schoolroom, the court of appeals has applied it to invalidate Judge Constangy's prayer in the courtroom.

B. The Court of Appeals' Decision Does Not Conflict with this Court's Decision in *Marsh v. Chambers.*

In the singular case of *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court held that the Establishment Clause did not forbid the long-standing practice of the Nebraska legislature of paying a Presbyterian chaplain to open its sessions with prayer. The Court pointed out that the First Congress, three days before reaching final agreement on the language of the Bill of Rights, authorized the appointment of paid chaplains who opened its sessions with prayer. 463 U.S. at 789. Since that time, Congress has continued this practice without interruption, and most states have consistently followed the practice. 463 U.S. at 789-91. Relying on this "unambiguous and unbroken history of more than 200 years," 463 U.S. at 793, the Court concluded that legislative prayer was not a practice respecting an establishment of religion.

Unlike the legislative prayer permitted in *Marsh v. Chambers,* 463 U.S. 783 (1983), Judge Constangy's court-opening prayer lacks an unbroken 200-year historical tradition or explicit sanction by the framers of the Bill of Rights. Moreover, as the court of appeals noted, "it cannot be said that judicial prayer has no greater potential for an establishment of religion than legislative prayer." *North Carolina Civil Liberties Union v. Constangy,* 947 F.2d at 1149. Thus the court of appeals correctly concluded that the Establishment Clause exception articulated in *Marsh v. Chambers* does not apply to Judge Constangy's court-opening prayer.

1. Court-opening prayer is not sanctioned by historical tradition.

The court of appeals distinguished legislative prayer from other unconstitutional official prayers because of legislative prayer's "unique history":

> The [*Marsh*] Court noted that sessions of Congress have opened with prayer for over two hundred years, and that the Nebraska legislature has opened with prayer for over one hundred years. Moreover, the Court found that in this case historical evidence shed light on the Framers' intent in drafting the Establishment Clause. In particular, the Court observed that the First Congress established the practice of opening Congress with prayer soon after the Constitution and the Establishment Clause were drafted.

North Carolina Civil Liberties Union v. Constangy, 947 F.2d at 1147. *See Marsh v. Chambers,* 463 U.S. at 789-93.

Later decisions of this Court emphasize the unique historical circumstances of legislative prayer in refusing to apply the *Marsh* rationale to other Establishment Clause cases.

> The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh v. Chambers* . . . , where the Court held that the Nebraska Legislature's practice of opening a session with prayer by a chaplain paid by the State did not violate the Establishment Clause. The Court based its conclusion in that case on the historical acceptance of the practice.

Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987). *See Lynch v. Donnelly*, 465 U.S. at 674 (Congress' authorization of legislative prayer contemporaneously with adoption of Bill of Rights was distinguishing feature in *Marsh*).

The Court also declined to apply the *Marsh* rationale on historical grounds in its most recent Establishment Clause decision, *County of Allegheny v. American Civil Liberties Union*. Writing for the Court, Justice Blackmun explained that "[i]n *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights." 492 U.S. at 602, 109 S. Ct. at 3106.

Congress, however, has never authorized judicial prayer. "There is no evidence regarding the intent of the Framers of the Bill of Rights with regard to the opening of court with prayer." *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d at 1148. Moreover, there is no "unambiguous and unbroken history of more than 200 years" of opening either federal or North Carolina courts with prayer.

At trial, Judge Constangy offered no evidence or argument regarding a historical practice of opening court with prayer. His evidence indicated only that three other North Carolina judges recently have opened their courts with prayer. Tr. 102-04; J.A. 187, 189, 193. As the court of appeals in the instant case stated, "a few examples of judges who open court with prayer is hardly comparable to the common practice of opening sessions of legislatures with prayer." 947 F.2d at 1149.[4]

In his petition to this Court, Judge Constangy cites a mere 13 instances of prayer, all in the Eastern Circuit Court, between the years of 1790 and 1800, and involving only five justices.[5] More than half of the instances he cites occurred before the ratification of the Bill of Rights. Judge Constangy cites no instance of prayer in any federal court after 1800. His archaic, anecdotal references to prayer in the earliest years of the circuit court prove neither historical precedent nor acceptance by the courts. Their scarcity proves the contrary. Whatever the colonial practice, there is no record of any federal court opening with prayer for almost 200 years.

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[4] North Carolina has seven supreme court justices, 12 court of appeals judges, 82 regular superior court judges and 164 regular district court judges, as well as various emergency and retired judges available for duty. N.C. Gen. Stat. §§ 7A-10, -16, -41-57. The practice of four North Carolina judges among more than 265 North Carolina judges is aberrational.

[5] Except for one instance with Justice Iredell and another with Justice Patterson, all instances of prayer occurred with Chief Justice Jay, Justice Cushing or Justice Wilson. Thus there is no record of prayer in the circuit courts of Justice Blair (1789-96), Justice Rutledge (1789-91), Chief Justice Ellsworth (1795-1801), Justice Chase (1796-1811) or Justice Moore (1799-1804). *See The Documentary History of the Supreme Court of the United States, 1789-1800,* Vol. II.

Thus the district court and the court of appeals properly limited the exceptional case of *Marsh v. Chambers* to legislative prayer as an instance of long-standing historical acceptance. Court-opening prayer has no similar "unambiguous and unbroken" history. On historical grounds alone, the holding of *Marsh* is inapplicable to the instant case.

2. Court-opening prayer has far greater potential for establishment of religion than legislative prayer.

The court below also properly declined to apply the holding in *Marsh* because judicial prayer has "greater potential for an establishment of religion than legislative prayer." 947 F.2d at 1149. Indeed, the circumstances surrounding Judge Constangy's court-opening prayer are fundamentally coercive.

Court-opening prayer is inherently coercive. As the court of appeals explained, the potentially coercive quality of courtroom prayer differs markedly from a chaplain opening legislative sessions with prayer. Legislators primarily direct legislative prayer "at the legislators themselves, who have decided to have prayer." *Id.* Such legislative prayer does not urge citizens or litigants to engage in religious practices, as a majority of this Court stated in *Allegheny,* "and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct." 492 U.S. at 603 n. 52.

In striking contrast to legislative prayer, Judge Constangy directs his courtroom prayer "not to fellow consenting judges but to the litigants and their attorneys." 947 F.2d at 1149. Unlike legislators, who are free to leave or object to the prayer, litigants and attorneys in Judge Constangy's courtroom have no realistic opportunity to escape hearing his prayer. The courtroom is often full at the beginning of a session. Judge Constangy's prayer lasts 30 to 40 seconds. A litigant seated in the middle of the courtroom could hardly exit before the prayer was finished, especially since most persons present bow their heads. If the litigant's or witness' case were called immediately after the prayer, he or she would be passed over and would then wait an hour or more until the case was recalled. Moreover, Judge Constangy frequently holds criminal district court, where many litigants and witnesses, including children, are compelled to be present under court order or subpoena. J.A. 62-64, 89, 112-21. Would a criminal defendant free on bond feel at liberty to exit when the prayer began and then re-enter after the prayer (when Judge Constangy has his eyes open)?

The exigencies of criminal court practice also require attorneys in Judge Constangy's court to be present during his prayer. Each individual plaintiff testified without rebuttal that the time preceding and following the court-opening prayer is often utilized by attorneys to discuss cases with the assistant district attorney and police officers, and to determine the presence of their clients. Absenting oneself from Judge Constangy's prayer interferes with an attorney's ability to handle cases and on occasion results in delays. J.A. 98, 102, 106.

Judge Constangy thus compels the litigants and attorneys who appear before him to worship his God, just as if he were compelling them to attend church. They may silently object, or a few lawyers may exit the courtroom, but all others are effectively forced to participate in his form of worship. Even those who leave are forced to acknowledge his prayer by their leaving. No one is literally forced to kneel in prayer, but the message is implicit in the scene that one should bow the head and pray to Judge Constangy's God.

Legislatures function as political bodies, openly and properly so. Their practices are perceived to be responsive to majority will. "Most importantly, unlike judges, legislators do not have an obligation to be neutral. A legislature is by its very nature partisan and political." 947 F.2d at 1149. The partisan, political, activist duties of legislators pointedly distinguish them from judges, who must be neutral and reactive.

That profound distinction between courts and legislatures and the particular coercive circumstances of Judge Constangy's practice compel the conclusion of the court below: "Because a judge must be a neutral decision-maker, prayer in court by a judge has far more potential for establishing religion than legislative prayer." *Id.* Thus even ignoring its unique requirement of long-standing historical acceptance, *Marsh* does not validate the public prayer in the instant case. The court of appeals' decision is consistent not only with this Court's 30-year history of Establishment Clause decisions, but with the decision in *Marsh*.[6]

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[6] Judge Constangy cannot be serious in contending that the Establishment Clause applies only to acts of Congress.

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IV. THIS COURT SHOULD DENY REVIEW BECAUSE JUDGE CONSTANGY'S COURT-OPENING PRAYER FAILS ANY CONCEIVABLE ESTABLISHMENT CLAUSE TEST.

Judge Constangy's court-opening prayer is a purely religious act by a public official in the coercive environment of a state criminal district courtroom, which must be open and neutral. His prayer thus fails not only the *Lemon* test, but any conceivable Establishment Clause test. Because the prayer would violate any actual or conceivable Establishment Clause standard, this Court need not review the lower court's decision, nor should it delay denial of the petition until it has decided the case of *Lee v. Weisman*, U.S. No. 90-1014.

The court of appeals recognized that Judge Constangy's prayer was unconstitutional under any formulation when it stated that "the practice at issue in this case is clearly unconstitutional under all the tests and criteria

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Petition for Writ of Certiorari, at p. 20. That contention contravenes dozens of Supreme Court decisions. This Court has applied the First Amendment to actions by state governments since 1925, *Gitlow v. New York*, 268 U.S. 652, 666 (1925), and first applied the Establishment Clause to state and municipal action in 1947, *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). For more than 60 years, this Court often has held that state and local governmental actions – including actions of the courts – violate the First Amendment. *E.g., County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (county's religious practice violates Establishment Clause); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (state court's application of state rule of law violates free press clause).

developed by the Supreme Court in the Establishment Clause area." 947 F.2d at 1152-53.

Even under the standard proposed in Justice Kennedy's dissenting opinion in *Allegheny County v. American Civil Liberties Union,* Judge Constangy's prayer clearly violates the Establishment Clause. Justice Kennedy's opinion identifies two absolute prohibitions under the Establishment Clause: "government may not coerce anyone to support or participate in any religion or its exercise," and government may not directly benefit religion. 492 U.S. at ___, 109 S. Ct. at 3136. Under his formulation, coercive religious practices are always unconstitutional. Like the school prayer in *Engel v. Vitale,* Judge Constangy's prayer is inherently coercive; hence no further inquiry is required under Justice Kennedy's formulation. 492 U.S. at ___, 109 S. Ct. at 3137 n.1 (Kennedy, J., concurring in part and dissenting in part).

Likewise, Judge Constangy's prayer violates the "endorsement test" first suggested by Justice O'Connor in her concurrence in *Lynch v. Donnelly.* Under Justice O'Connor's analysis, "government endorsement or disapproval of religion" violates the Establishment Clause because "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." 465 U.S. at 688 (O'Connor, J., concurring). Applying this standard, Justice O'Connor concluded that Pawtuckett's Christmas display, including both secular symbols and a creche, in a privately owned park was not constitutionally objectionable, but that placement of a nativity scene in the lobby of the Allegheny County

Courthouse "has the unconstitutional effect of conveying a government endorsement of Christianity." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. at ___, 109 S. Ct. at 3119 (O'Connor, J., concurring). She stated that the display of a religious symbol in a *courthouse* "runs a special risk of 'mak[ing] religion relevant, in reality or public perception, to status in the political community.' " *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring)).

Judge Constangy's religious act of prayer – in a courtroom where citizens and attorneys are compelled to attend – creates an untenable risk of making religion relevant, whether in the reality of a nonbelieving criminal defendant who feels compelled to join in prayer, or in the perception of a public that may doubt the court's neutrality. In the context of the courtroom, Judge Constangy's prayer is an overt and unconstitutional endorsement of religion.

Like state-sponsored prayer in the public schools, Judge Constangy's court-opening prayer violates all three *Lemon* tests, the prohibition against coercion or proselytizing theorized by Justice Kennedy, and the endorsement test proposed by Justice O'Connor. Such prayer, therefore, fails any test imposed or suggested by this Court for determining a violation of the Establishment Clause.

Respectfully submitted, this 24th day of February, 1992.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE HONORABLE H. WILLIAM CONSTANGY,
Petitioner,
v.
NORTH CAROLINA CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Does an "offended observer" of an alleged violation of the Establishment Clause of the First Amendment have standing under Article III to challenge that alleged violation?

2. Does the custom of a state district judge to open each daily courtroom session with a nonsectarian invocation violate the Establishment Clause of the First Amendment?

PARTIES

Petitioner accepts respondents' representation that, contrary to the caption in the opinion of the court below, the proper name of the organizational respondent is the North Carolina Civil Liberties Union.

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner, H. William Constangy, a state court judge, challenges respondents' standing, as "offended observers," to bring suit attacking his practice of opening daily court with a brief invocation. Pet. § I. Judge Constangy also seeks review of the court of appeals' holding that this nonsectarian invocation violates the Establishment Clause of the First Amendment. Pet. §§ II, III. Finally, Judge Constangy urges this Court, in the alternative, to grant review, vacate the decision below, and remand this case for further consideration in light of the forthcoming decision in *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991). Pet. § IV.

Respondents have presented no valid objection to review of the important questions presented in the case at bar.

ARGUMENT

I. THE CONCEPT OF "OFFENDED OBSERVER" STANDING UPON WHICH RESPONDENTS' SUIT RESTS CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. The Question of Respondents' Standing is Properly before this Court.

Respondents concede, as they must, that the question of standing "cannot be waived" and "may be raised for the first time in this Court." Brief in Opposition at 8. Indeed, this Court is free to raise the issue *sua sponte*, *see Bender v. Williamsport Area School District*, 475 U.S. 534, 539-41, 546-47 (1986), even when the parties are prepared to concede standing, *id.* at 541. Furthermore, it is "the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). This obligation is jurisdictional, *Bender*, 475 U.S. at 546-47, and remains subject to scrutiny at any stage of litigation, *id.* at 547.[1]

B. Respondents Lack Standing.

Respondents make no effort to reconcile their status as "offended observers" with the "actual injury" requirement for standing under Article III of the Constitution. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 485-86 (1982) (Article III requires "actual injury"; the "psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing"). *See generally* Pet. § 1.

Respondents attempt to transmute this subjective offense—that they "have felt intimidated or offended by Judge Contagny's prayer," Brief in Opp. at 9—into "injury in fact" by emphasizing that the respondents have *inconvenienced themselves* in order to avoid hearing the judge's daily invocation. *Id.* at 3-4, 9-10. Such voluntary, self-imposed maneuvers, however, cannot suffice to manufacture standing. Pet. at 12-13. If the *reaction* of an offended observer were to suffice for Article III purposes, any would-be litigant could challenge any government action simply by *responding* in some way. Thus, "injury in fact" would exist whenever a government official's mention of God in a public speech prompted someone to avoid attending an official event, or whenever some government program provoked a citizen into contributing money to an organization promoting contrary goals. Even going to the trouble of filing suit could be deemed an "injury" sufficient to confer standing. Obviously, such a rationale would eliminate standing as a meaningful concept.

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[1] Respondents cite no case to the contrary. The only case respondents cite to support their novel claim of "estoppel" is a Fourth Amendment case having nothing to do with Article III standing.

Respondents accuse Judge Constangy of deliberately neglecting the standing issue in the lower courts and seeking to "ambush" respondents in this Court. Brief in Opp. at 9. In so doing, respondents ignore the fact that Judge Constangy retained new counsel to prepare the petition to this Court. Counsel are ethically obligated to represent Judge Constangy zealously; counsel certainly are *not* obligated to overlook such a serious jurisdictional defect as respondents' lack of standing.

The undertaking of evasive countermeasures represents an exercise of liberty, not an injury in fact.[2]

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *MARSH v. CHAMBERS*.

The court below struck down Judge Constangy's practice of opening daily court with an invocation. This decision conflicts directly with *Marsh v. Chambers*, 463 U.S. 783 (1983), in which this Court upheld as constitutional the practice of the Nebraska legislature to open daily sessions with a prayer by a paid chaplain.

This Court noted in *Marsh* that the "opening of sessions of legislative *and other deliberative public bodies* with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786 (emphasis added). The Court specifically cited, as examples of "other deliberative public bodies," the federal courts, *id.*, which traditionally open proceedings with the invocation, "God save the United States and this Honorable Court," *id.* Judge Constangy has likewise documented a practice of using invocations, in federal judicial proceedings, which dates back to the period both immediately before and subsequent to the passage of the Bill of Rights. Pet. at 16-19.

Marsh found the historical practice of public invocations to be decisive of the question whether the Establishment Clause permitted such practices. The lower court's rejection of Judge Constangy's daily invocation is therefore irreconcilable with *Marsh*.

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[2] Respondents' list of six supposedly "comparable" cases, Brief in Opp. at 10, is not comparable at all. None of these cases hold that "offended observers" have standing, whether they engage in evasive maneuvers or not. Four of these cases involved allegedly unconstitutional practices in public schools. The present case, by contrast, involves neither parents nor impressionable children, *see* Pet. at 12 n.10, and none of the respondents claim standing as a parent. (Respondents' repeated and unsupported assertion that the present case involves children, Brief in Opp. at 10, 25, is simply incorrect.) The other two cases respondents cite did not even discuss standing.

Respondents, like the court below, seek to dismiss *Marsh* as a "singular case," Brief in Opp. at 20, with virtually no precedential value outside its particular facts, *id.* at 20-22. But even if this grudging view of *Marsh* were justified—which it is not—the fact would remain that the practice of opening court with an invocation comes within the very core of the rationale of *Marsh*.

Respondents seek to evade *Marsh* by claiming that courtroom invocations have a "greater potential for an establishment of religion" than do legislative invocations. Brief in Opp. at 24 (internal quotation marks omitted; quoting court of appeals, *see* Pet. App. 8a). But this argument is both irrelevant and incorrect. Pet. at 19-20. If, as this Court held in *Marsh*, 463 U.S. at 795, the threat of establishment of religion by means of invocations is "mere shadow," then a comparison of legislative and judicial "shadows," to see which is less insignificant, is absurd. Furthermore, the text of the Establishment Clause itself focuses on "Congress" making "law," which would indicate—if anything—that the potential for establishment is greatest with the *legislative* branch, not the judiciary.

Respondents' assertion that Judge Constangy, merely by reciting an invocation, "compels the litigants and attorneys who appear before him to worship his God, just as if he were compelling them to attend church," Brief in Opp. at 26, is nonsensical and flatly contrary to *Marsh*.

The conflict of the decision below with *Marsh* could not be greater without the court of appeals expressly repudiating *Marsh*.

III. THIS CASE RAISES IMPORTANT AND UNSETTLED QUESTIONS REGARDING THE *LEMON* TEST UNDER THE ESTABLISHMENT CLAUSE.

The court of appeals applied an extreme and expansive version of the *Lemon* test in the case at bar. Pet.

§ III(A). In the name of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court below held that the Establishment Clause forbids any action by a government official which: a) reflects a personal religious purpose, Pet. at 21-22; b) is perceived by objecting individuals as having the "effect" of endorsing religion, *id.* at 23; or, c) has religious significance, *id.* at 24-25. This Court should grant review to examine the legitimacy of this exaggerated version of *Lemon.*

Respondents' defense of the court below actually highlights the extremity of that court's ruling.

A. "Purpose" Prong.

The court of appeals construed the "purpose" prong of *Lemon* to require a factual inquiry into "Judge Constangy's actual intent," *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (Pet. App. 11a).[3] Properly construed, however, *Lemon* requires no such subjective inquiry: what is relevant is the objective governmental purpose, not the subjective motivations of public officials. *See* Pet. at 21-22.

Respondents counter by labeling invocations as *per se* unconstitutionally tainted by a religious purpose: "Under any 'objective' standard, prayer is a religious act, wholly lacking in secular purpose." Brief in Opp. at 14. This *per se* rule, however, flies squarely in the face of *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld legislative prayers. (Respondents' rigid version of *Lemon* also would automatically invalidate all official invocations, including the cry, "God save this Honorable Court.")

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[3] Respondents likewise equate personal religious motivations with an unconstitutional "purpose" under *Lemon.* Brief in Opp. at 5-6. Such an equation is completely incompatible with religious liberty. Pet. at 21-22. Judge Constangy therefore properly resisted the efforts of respondents' counsel to press ambiguous questions about "religious purpose" without clarifying whether counsel meant "purpose" under *Lemon* (a conclusion of law) or simply personal motivation. Pet. at 22 n.15.

The court below held that, to survive the *Lemon* "purpose" test, the challenged activity must be strictly *necessary* and *effective* for the fulfillment of the asserted secular purpose. *See* Brief in Opp. at 12. In the case at bar, Judge Constangy explained that one of the purposes of the daily invocation was to "produce a calm, quiet, serious atmosphere in the courtroom for the day," Tr. 54. This is plainly a legitimate secular purpose. *See Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (secular purpose of invocations). Yet the court below rejected this secular purpose for two reasons: first, Judge Constangy did not repeat the invocation in the afternoon, and therefore the invocation must not really be *necessary*, 947 F.2d at 1150 (Pet. App. 10a);[4] and second, the atmosphere during the afternoon session and in other judges' courtrooms was no different from the atmosphere in Judge Constangy's courtroom during the morning session, and therefore the invocation must not really be *effective*, *id.* (Pet. App. 11a).

This Court has never required a governmental purpose to be not only secular, but also demonstrably both *necessary* and *effective*. *E.g.*, *Lynch*, 465 U.S. at 681 n.7 ("irrelevant" whether inclusion of Nativity scene in municipal display is necessary in order to fulfill asserted secular purpose). Such a strict test would invalidate not only all invocations at public events, but also all ceremonial or commemorative religious references (e.g., inscriptions on monuments, the motto "In God We Trust," the phrase "under God" in the pledge of allegiance, and so forth).

B. "Effect" Prong.

The court of appeals construed the "primary effect" prong of *Lemon* to require a factual "focus" on how Judge Constangy's invocation "was perceived." 947 F.2d at 1151 (Pet. App. 12a). If an observer perceives a

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[4] Both respondents and the court of appeals neglect to mention that this Court similarly uses the invocation, "God save this Honorable Court," only in morning sessions.

"message of endorsement of religion," *id.*, the challenged practice is unconstitutional, *id.*

This version of *Lemon*'s "effect" prong essentially creates a heckler's veto over any activity that an atheist (or anyone else) might find objectionable. Pet. at 23. This Court has never embraced such a view. *See, e.g.*, *Lynch*, 465 U.S. at 683 (no unconstitutional "effect" just because "some observers may perceive that the city has aligned itself with the Christian faith"). Respondents attempt to limit this "veto" doctrine by suggesting that the offended observer's perception of an endorsement of religion must be "reasonable," Brief in Opp. at 15-16; respondents, however, offer no principled basis for classifying the perceptions of the scrupulous separationist as objectively "unreasonable."

Respondents claim to distinguish such commonplace official acknowledgements of God as the motto on currency and the opening cry of this Court on the basis that these practices represent "deistic references that have lost their religious meaning." Brief in Opp. at 16-17. This is tantamount to arguing that government officials may only invoke God when they take His Name in vain. The Establishment Clause, however, does not require "callous indifference" to religious matters. *Lynch*, 465 U.S. at 673 (citation omitted). Nor may the Establishment Clause "be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concuring in judgment).

Invocations are not constitutionally taboo. By condemning Judge Constangy's opening invocation as "a religious act," 947 F.2d at 1151 (Pet. App. 13a), the court below stretched the "effect" prong of *Lemon* beyond constitutional limits.

C. "Entanglement" Prong.

The court of appeals construed the "entanglement" prong of *Lemon* to forbid identifiably religious activity by public officials. The court ruled that Judge Constangy's daily invocation produced a "merging of judicial and religious functions" and impermissibly risked creating "divisiveness along religious lines." 947 F.2d at 1152 (Pet. App. 15a) In so ruling, the court below seriously misconstrued and misapplied the "entanglement" prong of the *Lemon* test. Pet. at 24-25.

In the first place, this Court has flatly stated that the political divisiveness test "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983). *Accord Lynch*, 465 U.S. at 684; *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987). The court below simply ignored these decisions, holding that there was an unconstitutional risk of political divisiveness despite the complete absence of any subsidies to parochial schools. Respondents lamely defend the court below; however, respondents provide no relevant authority that might justify this clear departure from the teaching of this Court. Brief in Opp. at 18-19.

The court below also erred in construing the "entanglement" prong to require the elimination of all traces of religion from official activities. The "entanglement" prong forbids interference with religious organizations by means of extensive monitoring of their functions. *See Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988) (and cases cited). While *Lemon* employed the phrase "government entanglement with religion," 403 U.S. at 613, both *Lemon* and subsequent cases clarify that it is more accurate to describe the test as forbiding "excessive entanglement between *church* and state," *Bowen*, 487 U.S. at 602 (emphasis added), not merely "*religion* and state," as respondents claim, Brief in Opp. at 18.

The court of appeals itself acknowledged that "entanglement" focuses upon "a problem of government involvement in the affairs of a particular religious organization." 947 F.2d at 1152 (Pet. App. 15a). The present case, however, involves no religious institutions or aid to parochial schools; hence, there is no danger of "intensive monitoring" of such entities, *Bowen*, 487 U.S. at 616, and the "entanglement" prong does not properly apply.

D. Validity and Scope of the *Lemon* Test.

The present case, as amply illustrated in the foregoing analysis and in Judge Constangy's petition for review, sharply implicates both the scope and the validity of the *Lemon* test. Pet. at 26-27. This Court should grant review to settle this important and recurring issue. *Id.*

Respondents assert that under *any* version of *Lemon* or proposed alternative tests for applying the Establishment Clause, Judge Constangy's daily courtroom invocation would be unconstitutional. Brief in Opp. at 27-29. The analysis respondents offer, however, does no more than import into these alternative tests the same erroneously strict separationism that infects the decision below. Indeed, respondents go so far as to condemn anything that creates a "risk of making religion relevant" to government activity. *Id.* at 29. This Court has forcefully rejected such extremism. *Lynch*, 465 U.S. at 678 ("an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court").

IV. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT REVIEW, VACATE THE DECISION BELOW, AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *LEE v. WEISMAN*.

The case of *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991), now pending before this Court, features issues that heavily overlap the issues presented in Judge Constangy's petition for review. Pet. § IV. (The prominent exception is the standing issue in the present petition, which independently merits review.) Therefore, this Court should either grant plenary review in the case at bar or vacate the decision below and remand for further consideration in light of *Lee v. Weisman*.

Respondents do not even cite *Lee*, much less discuss the case or try to explain why the forthcoming *Lee* decision should have no bearing upon the disposition of the present case. But the fact remains that *Lee*, like the case at bar, involves: a) a challenge to a public invocation; b) the application of the Establishment Clause to such an invocation; and, c) the scope and validity of the *Lemon* test. *See* Pet. at 28 (questions presented in *Lee*). Disposition of the present petition should not be divorced from this Court's resolution of the closely related *Lee* case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fourth Circuit or, in the alternative, grant the petition, vacate the decision of the court of appeals, and remand this case for further consideration in light of the decision of this Court in *Lee v. Weisman*, U.S. No. 90-1014 (argued Nov. 6, 1991).

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